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THE LAW AND CUSTOM

OF THE

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ANSON

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THE LAW AND CUSTOM OF THE CONSTITUTION

BY

THE RIGHT HONOURABLE
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IN THREE VOLUMES

VOL. I

PARLIAMENT

FIFTH EDITION

BY

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ADDENDUM.

Since p. 227 was printed, the Committee of Privileges has decided (3 March, 1922) in favour of the claim of a peeress in her own right to sit in the House of Lords.

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PREFACE TO THE FIFTH EDITION

There have been many changes in the statute law of Parliament since the last edition of this volume was published. The recasting and extension of the franchise by the Representation of the People Act, 1918, the creation of the Parliament of Northern Ireland, the disappearance of the representatives of Southern Ireland from the House of Commons, the presence of women in Parliament, are the most notable ; but changes in matters of detail are numerous also, as the Table of Statutes since 1911 testifies. Parliamentary custom and practice, on the other hand, have been singularly little affected even by the War, if the disappearance of the guillotine as a regular instrument of House of Commons procedure is excepted ; and indeed, far-reaching though the statutory changes have been, Parliament emerged from the struggle with its structure, machinery, and powers still essentially the same. If it was willing for a time of its own accord to delegate to the Executive some of its most jealously guarded powers, this was a proof, not of weakness, but of strength ; and for the Mother of Parliaments the final victory of the parliamentary peoples of the world must always possess a peculiar significance.

The necessary additions and alterations have been made in the text of the present edition without, it is hoped, in any way interfering with the framework and scheme of the book as planned by the author. Some few passages have, however, seemed to require modification in the light of further information or of changed circumstances.

The publication of the book has been delayed in order that the effect of the Irish Agreement of December 6, 1921, might be noted. The Agreement itself indicates the possibility of

further changes, and it is likely that the working out of its details will in any event involve others ; but in the circumstances another postponement seemed unnecessary. So rapidly have constitutional changes succeeded one another in the past few years that a book which should await finality would run grave risk of never seeing the light at all. A short account of the Northern Ireland Parliament and the text of the Irish Agreement are given in an Appendix.

There have been many important additions to the literature of the subject since the last edition was published. Professor Baldwin's book on *The King's Council* and that of Professor Pollard on *The Evolution of Parliament* have thrown fresh light on parliamentary origins. Colonel Durell's exhaustive work on *Parliamentary Grants* has made available a mass of information on national finance which has not hitherto been readily accessible to the public. The concluding volumes of the *Life of Lord Beaconsfield*, and the first two of the *Life of Lord Salisbury*, have revealed more of the inner working of the parliamentary machine during the nineteenth century.

The Editor gratefully acknowledges suggestions and information received from many friends and colleagues, and particularly from Professor H. W. C. Davis, C.B.E., and Professor A. F. Pollard, Mr. Charles Knight, C.B., of the Ministry of Health, the Hon. A. E. A. Napier, Deputy Clerk of the Crown, and Mr. Arthur Quekett, of the Ministry of Finance, Northern Ireland. He is especially indebted to Mr. W. M. Graham-Harrison, C.B., Second Parliamentary Counsel, for his kindness in reading the proof-sheets and for many valuable criticisms.

M. L. G.

February, 1922.

PREFACE TO THE FIRST EDITION

I HAVE endeavoured in this book to state the law relating to existing institutions, with so much of history as is necessary to explain how they have come to be what they are. The student of constitutional law realizes at every turn the truth of Dr. Stubbs' saying, that 'the roots of the present lie deep in the past'. Nevertheless a writer who wishes to describe our present constitution and its relations to the past, finds himself involved in difficulty, if he begins at the beginning. It is impossible to keep our institutions abreast along the course of history, from the Witenagemot to the Redistribution Act, without putting a severe strain upon the attention of the reader, and probably, in the end, sacrificing law to history, the present to the past. The lawyer primarily wants to know what an institution is, and then, the circumstances of its growth. I have tried to satisfy his first requirement, and, as to his second, to put him in the way of obtaining more knowledge than I can pretend to possess.

Nor, again, have I attempted to delineate the law of our constitution after the manner of Professor Dicey. He has drawn with unerring hand those features which distinguish our constitution from others, and has given us a picture which can hardly fail to impress itself on the mind with a sense of reality. I have tried to map out a portion of its surface and to fill in the details. He has done the work of an artist. I have tried to do the work of a surveyor.

I have dealt, in this volume, solely with Parliament, and hope in a subsequent volume to deal with the Executive.

Writing for students, I have treated some matters more fully and others less fully than the practical lawyer may think necessary; but where I have been brief I do not pretend to have written with a reserve of knowledge, and I have often said no more because I had no more to say.

W. R. A.

All Souls College,
March, 1886.

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INTRODUCTION

Our constitution presents some difficulties to the student which it may be well to note at the outset. To do so will explain why each of these volumes is prefaced with a brief historical sketch, in the one case of the development of Parliament, in the other of the growth and gradual limitation of the Prerogative.

The difficulties to which reference will be made arise from the fact that a constitution which began with the rude organization of a group of settlers in a hostile country has been adapted first to the wants of a highly civilized race, then to the government of a vast Empire, and this by an insensible process of change, without any attempt to recast it as a whole or even to state it in written form.

Our constitution is, in consequence, a somewhat rambling structure, and, like a house which many successive owners have altered just so far as suited their immediate wants or the fashion of the time, it bears the marks of many hands, and is convenient rather than symmetrical. Forms and phrases survive which have long since lost their meaning, and the adaptation of practice to convenience by a process of unconscious change has brought about in many cases a divergence of law and custom, of theory and practice. Let us begin with some of the things that may puzzle the student.

Sovereignty in our constitution

The student who has undergone a course of analytical jurisprudence, even with all the necessary reservations which are now made to Austinian theory, may be excused if he asks, Where is the Sovereign? Austin is ready with an answer—clear, logical, and wholly inapplicable to the constitution of to-day. Parliament is the sovereign.

according to Austin.

'It is absurd,' says Austin, 'to say that Parliament has legislative sovereign powers, but that the executive sovereign powers belong to the King alone. If the Parliament

Is Parliament sovereign?

is sovereign or absolute, every sovereign power must belong to that sovereign body or to one or more of its members as forming a part or parts of it. The powers of the King, considered as detached from that body, or the powers of any of its members considered in the same light, are not sovereign powers, but are simply and purely subordinate[1].'

The assumption here is wholly unwarranted by facts, as is his deduction from it, that the King is merely an emanation of the sovereignty of Parliament. Nor was this really necessary for Austin's purpose, which was to ascertain the province of Jurisprudence. This he finds to be conterminous with the rules of conduct made and enforced by the State; and, so far, his analysis is helpful; but when he comes to analyse the composition of the Sovereign or State we are at once landed in difficulties of his own making. Sovereignty in his view must be one and indivisible.

Theory of indivisibility

The theory of the indivisibility of sovereignty is a trouble to the student, whether as a constitutional lawyer he tries to adjust it to the relations of executive and legislature, or whether as an international lawyer he applies it to protected States, whose sovereignty is only impaired in respect of the control exercised over their foreign relations by another State.

unsuited to complex political societies

Theoretically there is no reason why legislative and executive duties should not be discharged by the same person or body of persons. It would be possible for such a person or body to make laws binding on the whole community, to work the machinery of government, enforce the law, determine policy in home and foreign affairs, make peace and war. But, in fact, as M. Laveleye has pointed out[2], the construction of free and highly organized States is complex, and the complexity increases with the guarantees for liberty which the constitution offers. Laws and taxes which affect all are, in such societies, agreed upon by a body

[1] Austin, Jurisprudence, Lect. vi.

[2] 'On pourrait même formuler le principe, que plus un régime politique est simple, plus il se rapproche à l'absolutisme : au contraire, plus il donne de garanties à la liberté, plus il est compliqué. Rien n'est aussi simple que le despotisme oriental, rien n'est aussi compliqué que les institutions des États-Unis.' Essai sur les formes de gouvernement, p. 59.

large enough to be representative of the whole community, too large for the prompt and united action which is needed of an executive if the executive is to be vigorous and efficient.

Not in accord with facts.

In truth, the picture which Austin draws of a legislature issuing commands, enforced by an executive which in some way may be regarded as a part of the legislature, is remote from the facts of our own, and of most, if not all, modern constitutions. The cohesion and good government of a State depend upon the certainty and promptitude with which law, made by the legislature, past or present, is enforced by the executive ; but this does not mean that executive and legislature are one ; rather it means that the law, and those who enforce the law, are alike in accord with the public opinion of the community. And the executive does other work besides enforcing obedience to the law.

Illustration.

Take the circumstances which attend the commencement of a war. The King declares war, acting on the advice of his ministers. Parliament is informed when this has been done. Troops are moved by order of military officers, for whose action the Secretary of State for War is responsible. The discipline of the troops is secured by the legislative provisions of the Army Act, and in this respect Austin might be satisfied ; but the general direction of affairs, for which the Secretary of State is responsible, cannot be traced to Parliamentary authority. His powers are derived from the Letters Patent which constitute the Army Council, and the Order in Council which distributes its business—documents which Parliament may criticize but which draw nothing of their authority from Parliamentary sanction.

Executive and legislative are distinct in our constitution.

In our constitution we can say not only that the executive and legislative powers are distinct to the extent above described, but that we can trace the process by which they have become distinct. The common element in both is the Crown. The Crown in Council once made laws and transacted the business of government. As the business of government increased in volume two things happened : the conduct of business in various departments passed into the hands of servants or ministers of the Crown ; and the cost of government necessitated an appeal to the Commons,

through their representatives, to grant the necessary supplies. Legislation, which meant the redress of grievances, was made a condition precedent to supply, and thus the law-making and taxing power passed into the hands of Parliament, a body distinct from the executive, who are the ministers of the Crown. The legislative and executive powers have, as it were, bifurcated, and there is a real dualism in our constitution, the Crown in Parliament and the Crown in Council. It may be said that the King acts on the advice of his ministers, that ministers are chosen and retained in deference to the views of the majority of the House of Commons, and that thus we get the union of all branches of sovereignty. But the sovereign eludes us even here, for the majority of the House of Commons does not constitute Parliament; and it must be admitted that facts are against the theory that sovereignty is one and indivisible.

Divergence of theory and practice:

But let us set aside the idea that sovereignty is one and indivisible, and ask what is the legislature, and what is the executive in this country, and how they work; we find at once a sharp divergence between theory and practice. We find that the King summons and dissolves Parliament, and

in legislation,

that laws are enacted by 'the King's most excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same.' But we also discover that in fact the Commons have an exclusive initiative and virtual control over one branch of legislation —the laws by which taxes are imposed—and that all legislation of an important or contentious character takes its origin in their House, and under the circumstances provided for in the Parliament Act (1911) may take effect without the consent of the Lords; that the power of the Crown has been reduced, since the reign of Henry VI, to a right to express assent or dissent to measures sent up by Lords and Commons; and that the veto which is all that custom has left to the Crown has not been exercised for 200 years.

in administration.

We turn to the executive. Ministers, as we learn, are the King's servants, appointed by him to superintend the various departments of government, holding office during pleasure; they stand in no legal relation to Parliament except that if office is accepted by a member of the House of Commons his seat is as a rule vacated, and he must offer himself for re-election, and that many offices are the creation of statute, and their holders are paid, for the most part[1], by Parliamentary grant.

Position of Ministers:

But we shall discover that the legal relations of King and ministers or of ministers and Parliament convey little idea of the practice. It is true that the King appoints the ministers, but he does so on the advice of the Prime Minister. It is true that he also appoints the Prime Minister, but the Prime Minister is practically chosen for him by the opinion of the party which a general election has placed in a majority in the House of Commons.

of the Cabinet.

The ministers thus chosen are not merely administrators of branches of the public service; the chief among them form a compact body called the Cabinet, which determines the general policy of the country at home and abroad. They hold office at the King's pleasure, but the King could not at his pleasure dismiss any one of them without imminent risk of losing the services of all. There is no statutory necessity that any one of them should be in Parliament, but in practice a minister who could not obtain a seat in the House of Commons, and who was not, and did not wish to be, a member of the House of Lords, could not continue to hold office for many weeks[2].

Party Government.

The secret lies in our system of party government. These heads of departments may or may not be skilled administrators—most likely they are not—but they are eminent party leaders, and as representing the party which the electorate has returned to power, they control the

[1] The Chancellor of the Duchy of Lancaster is paid out of the revenues of the Duchy, and the Secretary of State for India was, until 1919, paid out of the revenues of India.

[2] The cases in which during the war Ministers appointed for special purposes did not sit in either House were of course due to the exceptional circumstances of the time and do not affect the general rule.

policy of the country and transact, with the aid of a skilled permanent staff, the business of their offices [1].

Their presence in Parliament is necessary in the interests of the department, and in the interests of the party. The departments need to be defended, in case of adverse criticism, and to obtain the legislation which may concern their business; and the policy of the party, whether in legislation or administration, needs to be expounded by its leaders to the representatives of the people. We cannot imagine conditions in which a department might be left without authoritative defence to Parliamentary criticism, or in which the general policy of the Government was expounded only on the platform or in the public press.

These things are not necessary in law, but they have become necessary in fact, and so it comes about that if our constitution were stripped bare of convention, and displayed in its legal nakedness, it would be found not only unrecognizable, but unworkable.

Difficulty of finding the constitution.

But the student who has sought in vain among our institutions for the Austinian sovereign, who has sought with no more success to find out how the constitution works by examining the legal relations of our King, his ministers, and Parliament, may be driven to ask, Where is the Constitution?

It is unwritten.

The answer must be that the constitution is still unwritten [2], and that it never has been written out for the information of those who live under it or for the guidance of those who have to work it. The constitution must be found, by those who seek it, in statutes, in judicial decisions, in custom, in convention; it is set forth in textbooks; it may be learned in its important features by observation of the course and conduct of politics; but in authoritative documentary form it is not to be found. There are open questions on which judicial decision, which is usually of

[1] See vol. ii, The Crown, Part 2, Introduction.

[2] The Parliament Act, 1911 (1 & 2 Geo. V. c. 13), has fixed in statutory form the relations of the two Houses in important matters of legislation: but this is only an addition to the difficulty of giving a comprehensive account or survey of the patchwork of our institutions.

a negative character, might yet throw light on the limitations of the Privileges of Parliament, and the Prerogative of the Crown.

The subject may well puzzle alike the foreign jurist who is prepared to say, with de Tocqueville, that the English constitution does not exist, and the English student who is prepared to maintain that it is a monument of political sagacity, if he can only find it.

Whether written or unwritten, constitutions may develop in unanticipated directions. Use alters the shape of things so pliable as political institutions; an inconvenient rule is not observed, a convenient practice creeps in. The written constitution of the United States, rigid and uncompromising as its terms appear, has undergone this insensible modification in some of its most important parts. The whole machinery of a Presidential election has come to work in a manner never contemplated by the makers of the constitution, while the Senate, in its origin a Council of delegates entrusted with duties mainly executive and bound by such instructions as they might receive from those whom they represented, has become a Second Chamber exercising a free discretion as critics and moderators of the action of the House of Representatives.

But if a written constitution can thus by mere force of usage depart from the lines on which it was framed, a constitution which is nowhere set forth in a written form must needs be more liable to change. For custom cannot so easily encrust institutions which are ever present in black and white to those who live under them. And, moreover, where a constitution is written it is seldom changeable by the ordinary process of legislation. The ordinary legislature is not omnipotent.

Omnipotence of Parliament.

Our Parliament is omnipotent, and works with the same procedure whether it is removing an obsolete form, or whether it is disestablishing a Church or extending the franchise to a million or more of its fellow citizens.

Its limitations.

One thing no Parliament can do: the omnipotence of Parliament is available for change, but cannot stereotype rule or practice. Its power is a present power, and cannot be

A present power.

projected into the future so as to bind the same Parliament on a future day, or a future Parliament.

Illustration from Acts of Union.

The Acts of Union with Scotland and Ireland afford a good illustration of the extraordinary powers of Parliament and of the limitations to which reference has been made.

Each Act of Union involved the absorption of two sovereign legislative bodies in a new body different from either but possessing the powers of each: and each Act of Union contained provisions designed to be fundamental and unchangeable. No question was raised, or could be raised, as to the power of either Parliament to make this important change: but in each case the fundamental provisions have been altered by subsequent legislation.

This departure from terms which were intended to be permanent is the more noticeable because each Act was preceded by a settlement of the conditions of Union which is described as a treaty. In the first case the Parliaments of England and Scotland, in the second the Parliaments of Great Britain and Ireland, respectively, approved of terms in these treaties by which their sovereignty and their existence came to an end. Each Parliament with all its sovereign powers passed into a new body, the united Parliament of the two countries concerned in the transaction. But just as neither Parliament could make a law which should be unalterable by its successors, so the terms of a treaty of Union, though incorporated in the Act of Union, could not be placed beyond the powers of the new Parliament to alter.

Cannot bind its successor.

A Parliament may surrender its sovereignty to a new body, but it cannot in so doing place limitations on the power of that body unless the Act of Union altered the character of the constitution. If the new Parliament was to enjoy the same powers as the Parliaments which were united in it, they could not bind the new Parliament any more than the new Parliament could bind its successors. Parliament therefore is omnipotent to change, but cannot bind itself not to change, the constitution of which it forms a part.

Not only is Parliament unable to control the future, it cannot forecast the effect of changes deliberately made. When Parliament in 1705 repealed the clause in the Act of Settlement which excluded holders of office from the House of Commons, no one anticipated the system of Cabinet and party government which was thereby rendered possible. When Parliament in 1884 based our scheme of representation on single-member constituencies, Mr. Gladstone maintained that the change would ensure a better representation of minorities. Few anticipated the result, which we now experience—the hopeless position of minorities in some constituencies, the violent fluctuations of opinion in others.

Cannot forecast effects of legislation.

Our constitution is thus exposed to changes deliberately brought about by our sovereign legislature, with results which do not always correspond to the intentions of the legislature.

But there are other liabilities to change besides those which come from the deliberate action of the legislature or its possible, unexpected, and incidental results.

A constitution largely based on convention may be altered by processes which, though unobserved in their action, will ultimately affect the balance of power in the State.

Changes of practice.

The Cabinet, as is shown elsewhere, was no creation of a man of political genius. It began as a group of prominent personages with whom the King found it more satisfactory to discuss the business of the country than with the Privy Council or any definitely constituted committee of that body. Gradually this inner circle of advisers comes to be of one political complexion ; gradually it comes to be composed exclusively of the heads of Government departments ; no one can say when it became an accepted rule that these persons should be in one or other House of Parliament.

The Cabinet.

George I did not care to preside at discussions conducted in a language of which he was ignorant. Thenceforward it became the accepted rule that the King should leave to his ministers the determination of the policy of the country. The theory of ministerial responsibility and the constitutional position of the Prime Minister gained immensely in

Retirement of King from Cabinet.

force, if they did not owe their existence, to the fact that George I was an imperfect master of English.

Rules of Procedure:

In like manner the Standing Orders of the House of Commons, regulating its procedure in debate and the conduct of its business, may have results which go far beyond the mere convenience of the House or of the ministers who regulate the business of the House.

their constitutional importance,

The primary conception of rules of debate was that they should be so framed as to give every opportunity for discussing and questioning the proposals of the ministers of the Crown; that the grievances of the people should be heard before the business of Government could be done. The opposition to royal power, and to the ministers who represented it, developed into a regard for the rights of the opposition, who were presumably in the minority, and when State interference with the ordinary affairs of life was mainly concerned with the raising of taxes and the extension and enforcement of the criminal law, it was well that the rules should provide every opportunity for orderly discussion.

their adaptation to change of circumstance. Increase of business.

But the range of Government action widened, our Empire grew, and the union with Ireland and the extension of the franchise altered the composition of the House of Commons in number and in character. There were more subjects to discuss, the subjects themselves increased in complication, and there were also more members who desired to take part in debate. It became necessary to simplify procedure, and to obtain precedence for Government business if the ordinary business of Government was to be carried through within the reasonable limits of a Parliamentary session.

Need of legislation

Then, again, in the second half of the nineteenth century it became usual and expected that the Government of the day should in every session introduce one measure at least of important legislative change, on the passing of which a ministry staked its credit if not its existence. Thus a steadily increasing demand was made upon the time of the House.

Growth of obstruction.

Not long after the establishment of this belief in the need of continuous legislative change—a period which one may fix at the commencement of Mr. Gladstone's ministry of

1868—arose the practice of organized obstruction which we associate with the name of Mr. Parnell.

Extension of time allowed to Government.

Change in the conditions of debate led to changes in procedure. These at first took a shape designed to facilitate the ever-increasing volume of Government business by limiting opportunities for general discussion, and by appropriating more time to the exclusive use of the Government.

Power to allocate use of time.

Obstruction was met by rules which enabled the majority to bring any given debate to an issue by a vote taken with the consent of the Speaker, or Chairman of Committees. The closure, thus introduced, was further developed, and has since been used, not merely to bring to an end a debate which was unduly prolonged, but to allocate beforehand the period allowed for discussion of the various parts and stages of a Bill. This again was applied at first to meet cases in which the progress of a Bill was being delayed by a mass of amendments which would seem to serve the purpose of obstruction. It may now be used to mark out the time which is to be spent on the whole course of a Bill through the House, and to do this before a Bill has been read a second time, or before it has gone into Committee.

Incidental results.

These rules of procedure must be described hereafter and in detail: they serve here to show how changes made to meet an immediate difficulty or the convenience of the moment may alter the balance of forces in the constitution.

For every change of recent times has tended to enhance the power of the Cabinet. A large part of the time of the House of Commons is by Standing Order appropriated to the business of Government; and for some little time past ministers have not scrupled to encroach largely, with the aid of their majority, on the time allotted to private members. The Government therefore have the initiative in legislation, and the time of the House; they can also determine the number of days to be given to the discussion of a Bill, and allocate to individual clauses such time as they please; they can also bring debate on any topic to an end by the use of the closure.

But their powers do not end here. The Parliament Act of 1911 reduces the rights of the Lords in the matter of

finance to brief and formal discussion: in general legislation any Bill which has been passed by the Commons in three successive sessions and thrice rejected by the Lords, provided that two years have elapsed between the dates of its second reading on the first occasion, and the third reading on the third occasion of its passage through the Commons, may be presented to the King for the royal assent, though the Lords are not consenting parties.

Nor is this all. The discretionary prerogatives of the Crown as to the dissolution of Parliament, and the creation of peers with a view to providing ministers with a majority in the Second Chamber, have been placed unreservedly at the disposal of the Government, not to avert a deadlock, but to meet the contingency of a difference between the two Houses which had not at the time arisen.

Legislative sovereignty may be said largely to have passed to the Cabinet; and though ministers exercise this power because they represent the majority in the House of Commons, who in turn represent the majority in the country, it must be remembered that the threat of a dissolution is a curb to the will of any majority. Their Parliamentary existence is bound up with that of the Government, and to the certain expense of an election and the possible loss of a seat we must now add that the loss of a seat will henceforth mean the loss of a salary of £400 a year.

The results of these changes, often unintended, and not understood until they have been for some time at work, may serve to show that the student of any constitution, and more especially of our own, must look not merely to statutory provisions, to rules of procedure, or to an exact description of the legal relations of existing institutions. Real knowledge must be attained by inquiry into the practical working of the rules laid down, under the influence of the political forces in being; and even then he must realize that not only the action of an omnipotent Parliament but the silent process of changing use and custom may shift the balance of power, and that his work, though true to the letter, may soon cease to represent the spirit, of the constitution.

CHAPTER I

THE PLACE OF CONSTITUTIONAL LAW IN JURISPRUDENCE

The need to define the subject,

At the outset of a treatise on the English Constitution it is well to attempt some limitation or definition of the subject. If the law and custom of the Constitution is to be laid before the reader in an intelligible form, the writer has constantly to keep in mind the fact that, though nearly every law and every custom of the Constitution has a history—sometimes a long and interesting history—yet it is the Constitution as it now exists, and not the history of Constitutional law, with which he has to deal. And, again, although the operation of these laws and customs has to be explained as a matter of present living interest, it must never be forgotten that we are dealing with law and practice, and not with political science or political criticism.

as distinct from constitutional history

and political science.

At starting, therefore, we have to distinguish the subject of which it is proposed to treat from the topics dealt with on the one hand in the classical constitutional histories of Mr. Hallam and Dr. Stubbs, and on the other in the admirable descriptions of the practical working of the English Constitution supplied to us by Mr. Bagehot and Mr. Low. It has to be made clear that we are dealing with rules of law, and with customs which have grown up around these rules, obscuring in some departments the rules themselves. It may be—indeed it is—practically impossible to explain existing Law and Custom without some reference to its history, or to state existing practice without some account of the reasons for the divergence of the legal and the conventional Constitution; but such matters are illustrative and subordinate. The Laws and Customs, not their history or their political value, are what we are concerned with.

Constitutional Law in Jurisprudence

To define our subject, it is necessary to determine the place of constitutional law in the *Corpus Juris* of the country, and to distinguish, once for all, those topics with which constitutional law is apt to be confused.

is a branch of Public Law;

In order to find the place of constitutional law it is needless to go further than Sir Erskine Holland's analysis and classification of rights. A right is 'a capacity residing in one man of controlling with the assent and assistance of the State the actions of another.' Rights which may be enforced by one citizen against another constitute the body of Private Law. Rights which the State asserts to itself against the citizens, and rights which it permits to be exercised against itself, constitute Public Law. But inasmuch as the State is an artificial person, and, as such, assumes to itself the right to maintain order, to enforce the rules of conduct which it lays down, to possess property and compel the performance of contracts made with itself, and inasmuch as it is willing to incur proprietary and contractual liabilities, we need to inquire how this artificial person is constituted. This inquiry is the main business of the constitutional lawyer.

has to do with rights and duties of the Sovereign

and structure of State.

When we speak of the Sovereign body or State we mean the power by which rights are created and maintained, by which the acts or forbearances necessary to their maintenance are habitually enforced. This power in our community is diffused among a number of persons; in other words, our State is of complex construction. It consists of a number of persons or groups of persons who, in virtue of the part which they play in the working of the constitution, possess rights one against the other, and against the citizens in general. Their status is coloured by the fact that they are a portion of the machinery of Government.

The Crown is not Sovereign, nor is either House of Parliament, still less are the ministers or servants through whom the Crown conducts the executive business of Government; but each of these stands in established relations to the others, and to the general body of citizens, and of these relations some are fixed by law and some

by custom. For the State machinery may be said to consist of all who take part in the making or changing of the laws by which rights are created and protected, in the maintenance of order and settled rules of conduct within the community, in preserving its independence or representing it in its dealings with other communities. The connection and relations of these persons form the constitution of the country.

The analysis of this constitution, which forms the working machinery of the State, the consideration of its various parts, and the relation in which they stand to one another, is what it is proposed to undertake in respect of our own country.

We need to know what we mean by the State.

But when we talk of the State we often use the term with some uncertainty as to its meaning. Sometimes the expression is used as equivalent to a whole community, or independent political society. Sometimes it is limited to the central force, or sovereign, in that society. When we say that a man has deserved well of the State we mean, generally, that all persons in the community ought to be grateful to him: we may also mean that this gratitude should be expressed in a definite manner by the central power which represents the community. When we say that certain things should be done or provided by the State we mean that the law-making force of the community should lay down certain rules of conduct, and that these should be enforced, and the necessary provision made by the executive or administrative force of the community. So we come to inquire into the composition of this structure which we call the State—this machinery for concentrating and working the forces of the community. And since this concentration and regular working, whether of law-making or executive force, is a thing of gradual growth, we may help ourselves to a clearer understanding of the matter by considering the early history of societies.

The State begins when rules of conduct are en-

We need not trouble ourselves with the shifting groups of men who form the lowest types of savage life; it is early enough to begin with aggregates bound together by

forced by a central power.

ties of real or supposed kinship and by common customs. And when these customs begin to be observed in deference to some other sanction than the fear of individual violence or general ill-will that may follow upon their breach, we are able to trace the first germs of the State. Whether it is a council of priests, or of elders, or an individual habitually exalted above the rest by his strength or his cunning, so soon as conduct is enforced by some sanction, the fear of some evil, or the hope of some good, however indeterminate or occasional, which is not the arbitrary will of the casual bystander, or the general inclination of the crowd, we see the humble beginnings of the State or Sovereign.

Such power at first is slight,

The action of the State is at first inconsecutive and uncertain. It dares not depart from custom. It waits to be appealed to, and does not constrain conduct by fixed rules enforced by uniform penalties; it cannot always

but its sphere wide.

compel obedience to its own decisions. But in proportion as its power is weak its sphere is wide; religious observance and moral action, as well as the maintenance of order and the performance of promises, are its concern. The laws

As in the Jewish polity.

of the people of Israel cover every department of life—diet, cleanliness, domestic relations, religious observance, and many rules of general conduct which are observed in more highly organized communities either as matters of habitual morality, or by a few who aim at a life higher than that of the crowd. But set in the midst of this elaborate code are provisions which show the difficulty of bringing its enforcement under State control. The people are earnestly exhorted not to depend upon themselves for the decision of matters of controversy, each within his gates, but to make use of the courts indicated by the lawgiver, and, having there obtained judgment, to abide by the decision of the judge[1].

The Roman.

Again, in looking at the laws of the Twelve Tables we are impressed, not merely by the variety of detailed provisions as to the breadth of roads and the conduct of funerals, but by the position and importance assigned to Procedure. The first two tables are occupied with the rules

[1] Deuteronomy xvii. 8.

for getting parties before the court and keeping them there till the dispute is settled. The third regulates the mode in which the successful suitor may put into execution the decision of the court. The whole is a good illustration of the extent of State interference, of the misgivings of the State as to its powers of action, and of the desire of the State to obtain for its tribunals the settlement of disputes. The Roman State was at this time a community sufficiently well organized to have a reasonable prospect of enforcing the sentence of its tribunals if it could once obtain submission to them; but our own history furnishes us with an instructive illustration of the difficulties of a society which had no machinery for carrying out the decisions of its courts and could at best provide for the settlement of quarrels by some general rules, the observance of which might confine disturbance within reasonable limits. Mr. Green gives a vivid picture[1] of the course of proceedings by which an offender was put outside the protection of the folk and ceased to be within its peace. But the folk could do no more than withdraw its protection; it had no means of enforcing a punishment; this was left to the individual. All that the community could do was to say that the injured man might apply a violent remedy without incurring its wrath. This need of a central force to strike at the offender, this incompatibility of the private feud with public order, eventually reconciled the Saxon people to the substitution of the King's peace for the folk's peace, of the strong arm of the executive for the general disapproval of the community, of State interference for *laissez faire*.

The Anglo-Saxon.

So soon as we find a community entrusting to some person or body of persons among its members the task of maintaining and enforcing its customs, we may say that we have found the beginnings of the State; but in all communities which have attained to a high degree of political development, no sooner does this force manifest itself in definite and systematic working than its functions become more various and there takes place among those

Growth of the State.

[1] Conquest of England, p. 22; and see Pollock and Maitland, History of English Law, 2nd ed., ii. 449.

who have the exercise of it a separation into what in modern States we call the departments of Government. The maintenance of order and custom ceases to be dealt with by those who lead the armed forces of the society; the functions of the warrior are no longer combined with those of the judge; custom needs change as time goes on, or new customs, superseding the old, need to be checked by some general commands; a lawgiver is then required or a legislative assembly. To fight, to do justice, to assess and collect money, to make laws, is a heavy burden for an individual monarch or even for a body of men who have to act jointly in such matters. These duties come to be discharged by different servants of the same king, or by persons or bodies whom the popular choice elects. The original central force passes into more numerous hands, but its action becomes more constant and vigorous.

This dispersion of the forces which make up the Sovereign is one difficulty in the way of the Austinian analysis of Sovereignty. There is another which Austin made for himself by the arbitrary and unhistorical assumption that his Sovereign was at all times, and for all purposes, omnipotent: that there never was a time when this sovereign power could not alter at will such rules of conduct as it habitually enforced.

The State enforces but does not change custom,

This is not the case. Legislation, in so far as it means the breaking up of customs and the introduction of new rules of conduct, is a thing almost inconceivable to an early state of society. The maintenance or restoration of the *status quo ante* in personal freedom and property was the object alike of the Jewish land law and of the Solonian Seisachtheia; the ideal states of the Greek philosophers were so constructed as to avert, so far as possible, the risk or the need of development or change. To look nearer home, the earlier volumes of our Statutes are full of minute regulations on matters of local or social custom, but when an important change in the law is contemplated the long and apologetic preambles, such as we read in the Statute of Wills, show how much explanation was needed to make it acceptable to Parliament. To a modern House of Commons

till late in history.

it is almost enough that a practice has prevailed for a long time to create an impression that such a practice must need examination and revision. But the step is a long one from the time when the State first enforces custom vigorously and constantly, to the time when it takes upon itself without fear or hesitation to recast or alter custom.

And as it gets stronger its sphere narrows.

And we must further note that in proportion as the State becomes stronger, more complex, more active, so does it define its sphere of action in such a way as to exclude from its operation those rules of conduct which are better left to the guidance of the moralist and the priest. The State, as conceived by the lawgiver of Deuteronomy, swept with its intermittent action the whole area of human conduct; but the modern legislator, who can apply constant uniform pressure to procure the acts and forbearances which he desires to enjoin, strives hard, though not with unvarying success, to set limits to State interference, to keep religion and morals wholly outside these limits, to ascertain with precision what it is best to leave to the individual and what must be enforced by the central authority.

The strength of the State is the basis of Jurisprudence.

We are not so much concerned with the sphere of State action, or, in other words, the amount and direction of the forces which the State brings to bear upon individual conduct, as with the existence, the strength, and the complexity of these forces. For these forces *are* the State; their strength makes it sovereign; their complexity is what the constitutional lawyer has to unravel. It is the power to strike at offenders within and without which gives to States and maintains in them an individual existence: it is this which preserves them from inward collapse, and from absorption into the existence of other States outside them. We do not allow that because the collective force of the community—in other words, the State—narrows its sphere of action, it thereby admits a diminution of its power; nor do we allow that because the machinery for setting it in motion is complicated—in other words, because political power is vested in many hands—its action is therefore less regular and certain in the enforcement of such rules of

Its rules are the Law of the jurist.

conduct as are essential to its existence. Rather we should say that as the State defines the rules of conduct which it will enforce, and employs a uniform constraint for their enforcement—regular judicial process backed by the strong arm of the executive—it creates the Law with which alone the jurist can profitably deal.

What is Law.

All constraint which produces uniformity of human conduct by human agency may be regarded as creating Law. But so long as the constraint is wrought by public opinion which may act differently in different cases, or so long as the State cannot or will not use a regular machinery to ensure that penalty follows upon offence, the analytical jurist has no rules precise enough or stringent enough for him to work upon.

What is Positive Law.

When the State has attained to regularity in definition and enforcement of rules of conduct, then we get the Positive Law the province of which it was the object of Austin to determine, and then are completed the four sanctions of conduct or springs of human action indicated by Bentham.

The physical sanction,

A violent wind may blow a man against another in the street, or a stronger than he may take his hand and compel his signature to a document, or a fear of personal injury may prevent him from telling what he knows; this is the physical sanction.

the religious sanction,

Or a fear of wrath to come, or a desire for the growth within him of a spiritual life, may determine a man's conduct; this is the religious sanction.

the moral sanction,

Or a desire to obtain the good opinion, or to avoid the active dislike of others, many or few; or to conform to a standard of conduct which he conceives to be good for himself or for the world at large, may make a man give up pleasure or endure pain; this is the moral sanction.

And thus a man may be deterred from picking a pocket because the man whose pocket he was going to pick turns round and catches his wrist; or by fear of God's anger or care for the spiritual life; or by the knowledge that his neighbours will condemn him: but yet another and a fourth sanction must always be present to his mind, for the State,

or the community in its political character, has taken to itself the right to maintain order and to prevent violent and involuntary transfers of property by punishing offenders; and he knows that if he is detected he will be punished after such process of inquiry and in such ways as the State may provide.

the political sanction or Law proper.

The absolute strength of the State is a conception necessary to the foundation of any jurisprudence which is not merely a speculative and ideal arrangement of rules of conduct, but the complex structure of the State is the matter of difficulty to the student of constitutional law.

The King, who decides quarrels, declares customs, and leads his people in war, ceases after a while to discharge these duties as they become more elaborate and cover a wider surface. The community extends by absorbing others in conquest or by a natural process of growth, and can no longer assemble in its entirety to express its assent or dissent on matters of common interest. The various duties of the King pass into the hands of ministers, sometimes with the result, noticeable in our constitution, that he comes to be regarded as incapable of discharging these duties for himself. Thus we find in our own country that though every act in the State is in theory the act of the King or of the King in Council, there is scarcely an executive act which the King can perform without the intervention of a minister.

The specializing of political functions.

And as the Crown has lost the power of independent action in matters administrative, so it has lost independence and initiative in legislation. First, the community demands to be represented when money is granted, to assent to the amount and incidence of the tax; then the representatives claim to state grievances, departures from custom or need of change, before they grant the tax; then, instead of leaving it to the King and his council to make and promulgate the required law, the representatives undertake to frame and settle the law. The King's legislative power sinks to a formal right to assent or dissent from a law submitted to him, and this again to a merely formal

expression of assent. Though statutes are nominally enacted 'by the King's most excellent Majesty,' and the Lords and Commons do but advise and consent and give their authority thereto, the legislative power of the Crown has shrunk to a shadowy veto.

From what has been said it will appear that the complexity of a modern State, and in particular the complexity of modern English institutions, gives enough work to the constitutional lawyer if he is to disentangle and set out in their various relations the institutions of his country. It is the more important to keep his province clear of other fields of study which have been touched upon in what has just been said. The history of the conception of the State, its sphere of duty, the best possible disposition of forces in it, the mode in which they are or have been disposed at different times—all these topics are more or less susceptible of confusion with the topic of constitutional law.

Matters to be distinguished from Constitutional Law:

Let us try to sever them.

Legal Antiquities;

(*a*) There is the growth and development of the State in its rudimentary forms, the mode in which Law parts company with morals and religion, and becomes specialized as a code of conduct enforceable by a central power within the community—this is the department of historical jurisprudence, and is matter for the student of legal antiquities.

Political Economy and the limits of State interference;

(*b*) The determination of the rules which should be enforced by the State, as opposed to such as should be left to the moralist and the priest or preacher, is matter for the political economist and the student of political science: it is for them to discuss and settle the limits of State interference.

(*c*) But when once it is determined what rules of conduct the State shall enforce, the business of the jurist and of the legislator begins. For when the State enforces acts and forbearances, it at once creates rights; the analysis and arrangement of these rights is the business of the jurist.

Jurisprudence;

Moreover, it is one thing to say that certain acts and forbearances shall be made obligatory, and another thing to determine the mode in which they shall be so made, in what form, and with what sanctions for disobedience. The theory

of punishment (using the term punishment as including all forms of penalty or remedy for rights infringed), and the business of making laws, make up the province of the legislator. the theory of legislation;

(*d*) There yet remains for consideration the actual structure of the State. We may ask, after determining the due limits of State interference and the objects of State control, how the forces of the community may best be disposed with a view to the attainment of these objects; and this is a part of the business of the student of political science[1]. Political Science;

Or, we may ask how the forces of the community have been disposed in the past, noting the displacement and change of balance from time to time; and this is the business of the constitutional historian. Constitutional History;

Or, lastly, we may consider how the forces of the community are disposed here and now; what are the legal rights and duties of the various parts of the sovereign body against one another and against the community at large; and how the whole works together. If in our constitution we find that law and custom diverge, we must note first what is the law, and then how it has been overgrown by custom; and in so doing we shall do the duty of the constitutional lawyer, and stray as little as need be into the domain of other studies. It is a trite saying that the present can be explained only by reference to the past, and to set forth a bare outline of things as they are would be uninstructive, for in this country the tendency has always been to mend rather than to end an institution which has grown to be out of harmony with its surroundings. Nor is it desirable always to refrain from comment on the working Constitutional Law

[1] I may seem to have suggested under three different headings three matters, all of which might be included within the term 'political science.' It is not my business to find a terminology for the political philosopher, but his studies would seem to include three distinct things: the ascertainment of the limits of State Interference, so that he may know what the State should undertake; the theory of Legislation, so that he may know how the State should set about what it undertakes; and the Analysis and Comparison of Constitutions, so that he may know how the State may be best constructed and political forces best disposed with a view to the work of the State being done.—Author's Note.

of some parts of our institutions, or from comparison with institutions of a like character elsewhere. But our main business is to get a picture or at least a plan of the constitution as it is, in being, and with these reservations endeavour will be made to set forth, in as brief space as the subject allows, the features of the Parliament of to-day.

CHAPTER II

HISTORICAL OUTLINE

Object of a historical outline.

In dealing with the English constitution, regarded as a set of legal rules, we cannot dissociate ourselves from history. Many of these rules have a long past, many more cannot well be understood without some consideration of the circumstances under which they first came into being. But if we are to deal with the constitution as it is, we must needs limit its historical aspect to the narrowest dimensions. Therefore it is proposed at the outset to note the various phases through which our Parliamentary institutions have passed, so that it may be possible to fit the rules into their historical origin as each comes to be dealt with. In another portion of this work it is necessary to traverse some of the same ground in sketching the history of the Prerogatives of the Crown: but though the development of our Parliamentary institutions is intimately involved in that of the growth and limitations of royal power, it is hoped that the reader will find no undue repetition in this and in the corresponding chapter of the succeeding volume. A historical outline will clear the ground and enable the rest of the book to be confined, as far as possible, to the law and custom of the constitution as it now is.

The Saxon Constitution.

Character of Saxon polity:

The Anglo-Saxon or early English constitution was of the ordinary type of what Mr. Bagehot calls 'that common polity or germ of polity which we find in all the rude nations which have attained civilization—a consultative and tentative absolutism'. There was a King the chosen representative of the race, their leader in war and their judge in the last resort, an assembly of the wise, and the concourse of the people. But whatever may have been the

rights of the popular assembly or its position in the smaller kingdoms of the early Saxon times, it seems clear that when England became a united kingdom its government was conducted by King and witan. If the King had a strong will, and a good capacity for business, he ruled the witan; if not, the witan was the prevailing power in the State. But the Anglo-Saxon kingdom was always unstable. Perhaps from the mode in which the country was gradually acquired by the various conquering tribes, and from the gradual amalgamation of diverse kingdoms into one, the England of Saxon times was wanting in a sense of national unity. 'The cohesion of the nation', says Dr. Stubbs[1], 'was greatest in the lowest ranges. Family, township, hundred, county held together when ealdorman was struggling with ealdorman, and the King was left in isolated dignity.'

its weakness.

The Norman Administration.

Saxon government and Norman centralization.

The local organization was strong and formed the substantial contribution of the Anglo-Saxon polity to our constitutional growth. When the Norman kings came over, bringing with them the formulated feudalism of the continent, the strength of local custom gave them valuable help in resisting the efforts of the barons to break up the kingdom into a number of small principalities. They bound the people to themselves by reserving to the King the allegiance of every landowner and excepting it from the fealty which he swore to his lord: they used the local customs and institutions as a machinery for the administration of justice and the assessment and collection of revenue, and they worked this machinery from a strong central government over which they watched with personal and incessant care.

The Norman central and administrative system was brought into contact with Saxon local and representative institutions by the sessions of the royal justices in the shire moot. At these sessions offenders were presented to the King's justices by the twelve lawful men of the

[1] Const. Hist. i. (5th ed.) 231.

hundred, and the aid or tallage imposed by the King in Council was assessed and collected. So long as taxation fell upon land only, the liability of the tax-payer was settled by the sheriff, the justice, or the declaration of the tenant in chief: but personal property, when under Henry II it came to be taxed, required a closer system of assessment. Thus, for the collection of the Saladin Tithe representative men of each township were chosen to determine the liabilities of the tax-payers, and here we get the beginning of the connexion between taxation and representation.[1] Shortly, one may summarize the whole history of the process which now begins. First, the representatives of the locality calculate, upon the spot, the amount due from each individual of a tax fixed by the King; next they are sent to Parliament to hear what are the needs of the King, and to determine the total amount which shall be granted in response to his demands: finally they determine, in Parliament, not merely the amount which the Crown is to receive but the way in which the Crown shall spend it.

Growth of representation in connexion with taxation.

But this is at present far off. The King of the twelfth century judged and taxed, and commanded his feudal levies in war; he also issued edicts declaratory of custom or enacting changes of administration. This he did with the assistance of the feudal council, variously known as the *Concilium regis*, the *Curia regis*, or, on more important occasions, the *magnum* or *commune concilium*[2], a body which, in theory, consisted of all the tenants in chief, in practice, of the great noblemen and officials habitually attendant upon the King. But the system of administration was largely based on local representation for purposes of taxation and judicial procedure, and so we get a connection of the local and central power, which paved the way for the share in the government of the country given to other classes of the community by Edward I, and ultimately for parliamentary institutions.

Counse and consent.

The Great Charter is partly a declaration of rights.

The Charter.

[1] Stubbs, Const. Hist. i. (5th ed.) 625–8.

[2] Baldwin, The King's Council, pp. 3–6; Pollard, Evolution of Parliament, pp. 27–30; M'Ilwaine, The High Court of Parliament, pp. 16–18.

partly a treaty between Crown and people. For our purposes it contains a statement of the legal limits of the power of the Crown in a matter of paramount importance. It put on record the right of all tenants in chief to be parties to the grant of any scutage or aid other than the three customary aids. The Charter thus contains an admission by the King that consent is a condition precedent to taxation, at any rate in some of its forms. It is true that the right conferred was limited in its operation to the tenants in chief, but the principle, once established, could not fail to be extended in its application.

The Constitution of Edward I.

The *Curia regis.*

The *Curia regis* or *Concilium regis*[1] in the thirteenth century was a body exercising judicial, administrative, and (so far as they were exercised at all) legislative functions. The common law courts were still a part of it, and derived from it their powers and jurisdiction. It consisted of the royal officials, judicial and otherwise, and such of the great men of the realm and prelates whom the King might think fit to summon. These latter, indeed, as tenants in chief of the Crown were bound by virtue of their tenure to give suit and service at the King's Court. The *barones minores*, or lesser tenants in chief, were summoned not individually but generally, and joined with the freeholders to elect knights of the shire. To these Simon de Montfort in 1265 added citizens and burgesses for every city and borough, and the Commons thus appeared for the first time in a representative capacity at a meeting of the *Concilium regis*. As yet, however, they were not a regular part of the Council, being summoned from time to time as the financial needs of the King required, and we may assume that the Council's ordinary business was conducted by comparatively few persons, among whom the justices and the barons of the exchequer represented the professional element.

[1] The two names become gradually 'differentiated in meaning, the concilium denoting the curia in its consultative aspect . . . the curia regis on the other hand represented the same institution in its judicial aspect': Baldwin, The King's Council, p. 15.

Parliament: its constitution.

The word 'Parliament' has not at this period acquired the precise and definite meaning which we now attach to it. Used first in the general sense of 'conference' or 'discussion', it comes to be applied to particular sessions of the Council, to their manner of meeting rather than to the assembly itself.[1] Such meetings were meetings of the 'King's Council in Parliament', but were none the less meetings of the Council and not of any new body. They were attended by the persons who ordinarily attended or were summoned to the Council, reinforced from time to time by others specially summoned; and in the so-called Model Parliament of Edward I in 1295, not only was the baronage summoned by writ to each individually, the clergy by a like writ addressed to each bishop, but a writ addressed to the sheriff of each county commanded the election of two knights for each shire, two citizens for each city, and two burgesses for each borough. Yet the presence of these additional members was still not regarded as essential for the conduct of the business of the Council in Parliament.[2] The additional members might only be present for a part of the session, and the Council would proceed with its business 'in Parliament' after their departure in its accustomed manner. But a beginning had been made. The machinery of the county court, which had already been used for the choice of persons who should assess the taxation levied by the Crown, was now used for the choice of persons to represent the shire, and for the confirmation of the choice of their representatives by the town. And when these representatives, the choice of whom is notified from the sheriff in the county court to the Crown, meet in Parliament 'to execute what shall then be ordained by common counsel'[3], the Crown in Parliament begins to be distinguishable

[1] Maitland, Memor. de Parl. (Rolls Series), Introd. lxvii; Pollard, Evolution of Parliament, pp. 45-48.

[2] Mr. Pollard observes that the Clerks of Chancery who kept the Parliament Rolls did not apparently regard these re-inforced meetings of the Council as 'Parliaments' at all, in the sense in which they understood the expression. Their 'Parliaments' were the regular sessions of the Council at which the judicial and other royal business was conducted: Evolution of Parliament, pp. 47-8.

[3] Stubbs, Select Charters, 9th ed., 482.

from the Crown in Council, though a long time was to elapse before the respective functions of legislature and executive were clearly defined, and longer still before the two bodies found a means of working in some sort of habitual correspondence.

The Commons as a Political Power.

Voice of the Commons in legislation,

There was at first no clear recognition of the right of the representatives summoned to Parliament, whom we may now call the Commons, to a voice in legislation. The King in Council had been wont to declare customs, and make administrative changes. The assent of the Commons, though required for the purposes of taxation, was not otherwise essential and did not become so until 1322. Thus in 1290 the Statute Quia Emptores was passed *instantia magnatum* ; and it was indeed long before any clear distinction was drawn between legislative and judicial acts. If they wanted new laws the Commons did not frame them, but asked for them ; the Crown in Council legislated on petition of the Commons.

in administration.

Nor were the Commons always willing to recognize their position as critics if not advisers of the Crown and its ministers. When their opinion was asked on matters of executive government they were reluctant to give it, lest their advice should lead to expense for which they might be held responsible.

But the strength of the Commons lay in this, that when once the Crown had acknowledged its inability to lay taxes on the people without their consent, that consent could only be obtained through the representatives of the people in Parliament ; and further, in days when there was no press, nor means of getting at public opinion by organized demonstrations, it was only through the assemblage of the Commons that the King could ascertain the feeling of the country. And though the Commons might be reluctant to express opinions which would compromise them in the matter of taxation, yet a capable king would learn without much difficulty whether the country was with him or not, and a wise king would not act in grave matters unless he knew that the country was at his back.

So the Commons became necessary to the Crown: they were also necessary to the Baronage, for the Barons were frequently in an attitude of resistance to the Crown; it was upon them that feudal liabilities lay heaviest, and to have the Commons on their side was important to them. In the great Constitutional struggles of the middle ages, which ended in the acknowledgement by the Crown of its dependence upon Parliament for the grant of supply, we find the Barons leading and the Commons following their lead. Baronage allied with Commons

But though the King must go to the Commons for money, and though he could get no better information of the state of public feeling elsewhere, it was nevertheless a long time before they were able to exercise a substantial influence on the action of the executive, and some time before they could even acquire a hold upon legislation.

The Commons and the Executive.

For in their relations to the executive the criticism of the Commons was occasional, their control remote. They could denounce, but they could not denounce in time or complain before the mischief was done. If grants of money had been required at more regular intervals, or could have been appropriated more specifically to the purpose for which they had been asked, the Commons might at any time have stayed the hand of the executive by tightening the purse strings. But the Crown had an hereditary revenue from various sources which satisfied many of the needs of government. If the King wanted more, he asked for and obtained a grant of a tenth or a fifteenth on real or personal property. No means existed of assigning portions of the grant to particular services, or indeed of providing that the King should not spend the entire subsidy on purposes quite different from those for which it was asked. So when their grant was made the virtue had gone out of the Commons, and they could exercise no control over policy till money was wanted again. Their efforts to keep a hold on the King's ministers show that they knew their weakness in this respect. The oath of office and the practice of Independence of the executive.

Checks devised by Commons.

impeachment were attempts to impose upon the servants of the Crown a sense of duty, by fear of more or less remote contingencies.

The demand sometimes made that the officers of state should be chosen or at any rate nominated in the Commons is a curious anticipation of the modern practice[1]. Only the Commons desired in the middle ages to do directly and formally what in the modern constitution they do indirectly. The mediaeval Parliament wanted to be able to elect for the Crown the minister of its choice. The modern Parliament is content with the power of making it impossible for the Crown to employ others than those whom the majority of the House of Commons favours for the time.

The Commons and Legislation.

The control which the Commons exercised over legislation was acquired two hundred years sooner than their control over the executive; but not without a struggle.

The Confirmatio Chartarum (1297) made them necessary parties to taxation; and a statute of 1322 enacted that laws should not be made without their consent. But the consent thus required was of a vague and general sort. When asked for money they could claim that grievances should precede supply: but for such grievances as needed legislation for their redress the Commons had to be content with the King's promise that the necessary laws should be made. When Parliament had dispersed, the statue required was drafted and engrossed in the statute roll, or an ordinance issued to the same effect. But the Commons had no opportunity of seeing that their wishes were really carried out, or that if carried out they were not rendered liable to be defeated by saving clauses and the reservation of a dispensing power to the Crown.

Parliamentary control over legislation.

Nevertheless the process of legislation took much less time to acquire its modern aspect than did the connexion of the executive and the legislature. It was not till the end of the seventeenth century that party government

[1] Stubbs, Const. Hist. ii. (5th ed.) 589.

nd the relation of ministers to Parliament began to assume omething of their present form; but by the end of the ifteenth statutes had assumed the form which they still etain, and as early as the reign of Henry VI the framing f laws was undertaken and conducted by the Houses, and he King had ceased to do more than express a formal cceptance or rejection of the measure submitted to him.

By this means the mediaeval Parliament had acquired n effective control over legislation, while its control over he action of the Crown, or of the ministers of the Crown, emained uncertain and at best intermittent. But we must not therefore suppose that the King was free to do as he would either in the determination of general policy or in he details of administration, or that the only check upon im was the need of a reference to Parliament when money was wanted.

The Feudal King.

Contractual character of feudalism.

Feudal royalty did not possess the indelible sacredness which came to be attached to the kingly office in the eventeenth century. The liabilities of allegiance might be enounced as they were in the case of Edward II, or the ight to allegiance resigned as it was by Richard II. Feudalism was based upon contract, and a hopeless failure n performance of his part by the King was held to discharge is subjects from their corresponding duties.

The Council a check upon the Crown.

But there was a stronger curb upon the action of the King than this last appeal to the mutual undertakings f sovereign and subject. The executive was not the King ut the King in Council. The Council was composed of two lements. A large number of its members, as we have seen, were royal officials; but others were powerful barons and prelates, the representatives of two estates of the realm.[1] No doubt the regular work of the Council was done by the official members, who had made the King's service their career, and it is not likely that the barons were at any time prepared to give the same constant and laborious attention o the daily business of administration. But the barons, enacious of their rights as hereditary counsellors of the

[1] Baldwin, The King's Council, pp. 69 *et seq.*

Crown, strove nevertheless to keep control over policy, often in violent antagonism to the officials, and were able to influence policy in other ways than by their knowledge of the business of State. The nobles by their great estates and local influence could treat with the King on an independent footing ; the bishops could speak for the clergy, who were taxed separately from the laity, and often on a larger scale. The Council therefore was a counterpoise to the power of the Crown, unless the King was a man of exceptional vigour and capacity, who could seize a policy which should be popular with the Commons and carry it out with a skill and firmness which would secure the obedience of the Council. Nor did the Council hesitate to control the action of the Crown in details. The history of the royal seals shows the care taken that no official expression of the royal pleasure should be unauthenticated by an officer of State.

If we look for an habitual check on the prerogative we find it in the Council rather than in Parliament.

The Reformation and the Tudor Monarchy.

Sources of Tudor power.

Under the Tudor monarchy the character of kingship was changed. The Wars of the Roses left the baronage reduced alike in numbers and in power, the Commons exhausted and anxious only for a rule strong enough to give them peace, the Crown rich with the forfeited lands of those barons who had taken the wrong side in the dynastic quarrels of York and Lancaster. The Church was the only great power in the State which could cope with the Crown ; and the reform of the Church was now imminent.

Political effect of the Reformation.

The Reformation in England was the result of many conflicting currents of interest. But we must look at the matter from the point of view of Parliamentary history. By the dissolution of the monasteries the Church lost much besides wealth ; it lost social influence, for the monasteries had been the great educational centres and the great dispensers of charitable relief ; it lost political influence when the mitred abbots ceased to occupy the place they had filled in the House of Lords.

Thus many things combined to enhance the power of

the Crown. The destruction of the baronage not only freed the King from men who might control his policy and action, but enabled him to fill the great offices of state with new men. The Council was changed in composition; the great nobles bore a small proportion to the officials on their promotion: it was changed in its mode of working, split into departments with special business assigned to them; it ceased to be a check upon royal power; it became instead a formidable instrument in the hands of the Crown. The breach with Rome placed the King at the head of the national Church, and the spoils of the monasteries gave him an immense accession of wealth.

Maintenance of constitutional forms by the Tudors.

And yet in other ways the growing importance of Parliament was noticeable. The two great Tudor monarchs, Henry VIII and Elizabeth, showed their statesmanship in nothing more conspicuously than in their acceptance of all the forms of the constitution. When Henry VIII obtained for his Proclamations in certain cases the force of law, and was permitted to devise the Crown by will, these extraordinary powers were in each case conferred by Parliament and in statutory form. When Elizabeth desired to control the growing interest of the House of Commons in public affairs she packed the House with subservient members, representing small boroughs upon which she had conferred the franchise in order that they might return persons who would be under the influence of the court or its ministers. The Tudors were content with the substance of power, and left to Parliament everything but the reality of control over legislation and policy.

The issues between the Stuarts and Parliament.

Disregard of them by the Stuarts.

But this expedient for harmonizing the wishes of the House of Commons with the action of the executive is of itself an indication that a new struggle was beginning on the old ground. The Commons had begun to demand a voice in the general policy of the country, and to criticize the action of the executive in modern fashion. The first two Stuarts chafed at constitutional forms, and were incapable of a generous acceptance of a policy which they disliked.

Ship money and the Star Chamber.

The practical issue between the Crown and the Commons came to this, that the Crown claimed to tax without consent of Parliament, and to administer justice without the forms of law. Both parties appealed to the letter of old statutes, and neither seemed to see that with the change of times, and after the long lapse of political interest under the Tudors, the mediaeval constitution needed to be restated, or even recast, if King and Commons were to resume their old place and their old relations in political life.

The Petition of Right, 1628.

The Petition of Right was the first attempt to restate the rules of constitutional liberty on the lines of the Great Charter, but in defiance of its provisions Charles tried to dispense with Parliament in matters of taxation, and with the Courts of Law in matters of criminal justice. The Star Chamber, which exercised the coercive judicial powers of the Privy Council, had once been a useful means of bringing great offenders within the reach of the law by the strong arm of the executive. It now became, as indeed had always been possible, an instrument of political and ecclesiastical tyranny, wherewith the King was enabled to dispense with the forms of law where they were inconvenient, and to get the course of criminal justice into his hands.

Want of money brought the King back to Parliament at last, and the first acts of the Long Parliament were to sweep away the civil and criminal jurisdiction of the Privy Council, and to close every avenue against the raising of money by the Crown without the consent of the Commons. But the executive and the representative parts of the constitution had by this time drifted too far apart, and the monarchical policy of the first Stuarts ended in the catastrophe of the Civil War and the premature reforms of the Commonwealth.

Relations of Crown and Parliament, 1660–1688.

The Restoration did not give back what the Long Parliament had taken away—the criminal jurisdiction of the Privy Council; nor did it revive what the Long Parliament had set at rest—the right of the Crown to raise money,

whether by direct or by indirect taxation, without Parliamentary grant. The executive was weakened for the purposes of conflict with the legislature, but nothing was done to bring the ministers of the Crown into closer relation with the power which was fast becoming paramount in the constitution, the House of Commons.

In the reigns of the last two Stuarts one may summarize the relations of Parliament and the Crown somewhat as follows.

Revenues of the Crown in 1660.

The King could set up no claim to raise money without consent of Parliament: he possessed a revenue roughly calculated at £1,250,000 a year arising from the Crown lands and the proceeds of certain duties; he employed such ministers as he pleased, subject to the risk of their being impeached by the House of Commons if they and the House came to hopeless variance; and he conducted the business of government in concert with an inner circle of the Privy Council, consisting of such persons as he might think likely to promote the dispatch or enliven the progress of business. Any increase in the productive power of the sources of the revenue accrued to the King, who might to that extent become independent of Parliament.

Appropriation of supplies.

Any increase in the liabilities of government if it exceeded the ordinary revenue had to be met by a subsidy, or extraordinary grant, from the Commons, and such grants were for the first time in the reign of Charles II *appropriated* to the specific purposes for which they were made; that is to say, their use was limited to such purposes, and the money granted was not issued except under precautions that it should be so used. The Commons drew closer their control upon the action of the executive, but the periodical catastrophes of Charles the Second's reign—the exile of Clarendon, the impeachment of Danby—show how easy it was for a minister and a House of Commons to drift so far apart that their disputes could not be settled by a mere change of men.

Attempt to harmonize executive

The abortive Privy Council scheme of Sir William Temple in 1679 showed some consciousness of the risk arising from the lack of correspondence between ministers and the

and legislature.

Commons. The attempt to create an executive which should represent all classes and opinions could hardly have been expected to succeed, but it was something that the constitutional problem should have been recognized, though the solution was inadequate.

The dispensing power.

Taxation in Parliament and the free administration of justice had been secured by the Long Parliament; the last of the Stuarts revived an earlier claim of the Crown to independent legislative powers. The final struggle arose out of the attempt of James II to annul, of his own authority, statutes which had been thought essential to the security of the Protestant religion. The issue between the first Stuart and his subjects turned on the security of person and property, the right of the King to tax without Parliament and imprison without legal sentence. The issue between the last Stuart and his subjects turned on the King's right to suspend the law at his pleasure and by his individual act. The offer of the crown to William and Mary, their acceptance of it, and the codification in the Bill of Rights of the limitations on the royal prerogative, mark the beginning of the modern constitution.

The Modern Constitution.

1688. The Bill of Rights, how far a code.

The Bill of Rights is, on the face of it, a summary of constitutional rules: incidentally it settles some large and disputed questions of principle. In opposition to the doctrine that the Crown was a piece of real property which could never be without an owner, it declares the throne vacant. In opposition to the doctrine that the succession to the throne was a matter of divine indefeasible hereditary right, it regulates that succession. In opposition to the doctrine of passive obedience, it affixes conditions to the tenure of the Crown.

The Bill of Rights is perhaps the nearest approach to a constitutional code which we possess, but it does not profess to be a written constitution. It merely states the points which had been from time to time in issue between the Crown and its subjects since the reign of Edward I,

and on all points it declares in favour of the nation and against the Crown.

The Act of Settlement, which provided that the judges should no longer hold office at the pleasure of the Crown, and so took the control of justice from the hands of the King, was a fitting supplement to the constitutional provisions of the Bill of Rights.

Altered conception of royalty.

This summary of constitutional rules, setting at rest matters which had long been a source of difference, represents the legal result of the Revolution. The process by which the Crown was offered to William and Mary by the representatives of the estates of the realm is evidence of an altered conception of royalty which has practically determined the development of constitutional usage since 1688. It is worth considering how this conception of royalty has gradually been arrived at.

Mediaeval royalty.

Feudalism, which linked political power with the holding of land, had found the King a tribal chief, had made him the ultimate landlord of every man, and had turned sovereignty into a piece of real property, the rights to which were regulated by the feudal land-law. The practice of Commendation, where fealty was to be rendered on one side and protection on the other, gave to feudalism that element of personal loyalty which made treason the unpardonable sin of the Middle Ages. At the head of the feudal hierarchy, the lord of kings was the Emperor, but his shadowy lordship lost all practical meaning when the kingdoms of Europe became definite and compact; and the Reformation, which broke up the unity of Western Christendom, destroyed for ever the feudal conception of society, secular and spiritual, tending upwards to the Emperor and the Pope. And as the dependence of the King upon an earthly power was thus exploded, kingship obtained a higher place than it had occupied as a link in the feudal chain. For the connexion of sovereignty with property was still assumed, and the personal allegiance of feudalism remained, and when men sought for some theory of political duty they found it in the conception of Divine Right. The King held the kingdom as

Divine right.

property, his subjects owed him their fealty, and his tenure was of God.

Representative royalty.

And this theory of Divine Right grew into definite shape in opposition to a new conception of kingship. When, after the Reformation and with the rise of Puritanism, men began to regard the King rather as the official exponent of the wishes and aims of his people, the opponents of this view sought in the divine right of kings a basis of sovereignty and a theory of political duty which seemed to them surer than the convenience of a nation, or the need of having some outward embodiment of the State.

Result of new idea of royalty.

The act of the Convention Parliament which gave the crown to William and Mary was the recognition of the official and representative duties of the Crown of England. Whether, with the utilitarians, we say that government exists for the common good, or with Locke, that it exists for the purpose of securing to us natural rights, or with Hobbes, that it exists for the restraint of lawlessness and the protection of men from their own inclinations to rapine and revenge, we come to the same conclusion—that the State exists for our advantage, that the King is a part of the State, that he, like the rest of the State machinery, is not there of right except in so far as he fulfils his functions.

This practical view of the relations of the Crown and people had immediate effects.

The Mutiny Act.

The King was leader of the armed force of the nation, but the feudal levy was now extinct, the national levy or militia was inadequate, and the Bill of Rights had declared the maintenance of a standing army in time of peace without consent of Parliament to be contrary to law. Apart from this general proposition the maintenance of discipline in a standing army involves a departure from the ordinary course of law. The Commons were determined that such a power should not pass out of their control, and every year, for a year, they legalize the existence of a standing army and make provision for its discipline.

The appropriation of supplies.

Again the Crown had conducted the business of government on the resources supplied by the proceeds of Crown lands and of taxes settled on the King for life. If the

revenue was in excess of the needs of government the King could do as he liked with the balance; if it was deficient the King asked the Commons to make good the deficiency. But it was left to the King to conduct the entire financial business of state from year to year. After the Revolution this was changed. The King was not entrusted with the payment of all the charges of government; he was placed upon an allowance called the Civil List, calculated to meet the cost of the royal household and of the civil departments. The House of Commons took over the naval and military expenditure, and annually voted and paid the sums required. They thereby acquired a power of constantly reviewing the conduct of the King's ministers.

Dependence of ministers on Parliament.

But most important of all was the new relation in which the ministers of the Crown stood towards Parliament. With the increased control which the House of Commons acquired over the business of government came the necessity that the King's ministers should be able to work in harmony with a majority of the House. The King might choose his servants, but the House of Commons might make it difficult, if not impossible, for them to carry on the business of government.

Cabinet and Party Government.

The Cabinet.

And this newly acquired power of the House of Commons did more than limit the King's choice of ministers; it was incompatible with the discussion of matters of general policy by the Privy Council. The Privy Council was too large a body, and of too various political opinions, to act together or to guide its action by the wishes of a Parliamentary majority.

1. A committee of heads of departments.

Already the general policy of the country had come to be discussed by a small group chosen by the King from among the officers of state, and this had arisen partly from convenience, partly also from the dislike of Charles II to the formalities of a full meeting of the Council, and of William III to the communication of his policy to more than a few trusted statesmen.

2. United in holding the political opinions of the majority in the Commons.

It remained that this inner circle of advisers, made up of the chiefs of the various departments of government, should consist of persons of the same way of thinking in politics, and that this way should accord with the opinion, for the time, of the majority in the House of Commons. The necessity for this became clear, as Sunderland showed to William III, so soon as the increase in the power of the Commons became realized.

As early as the beginning of the eighteenth century Cabinet and party government existed in a rudimentary form, and thus the House of Commons obtained the control which mediaeval Parliaments had sought in vain over the selection of the executive and the policy of the country. But this power was nearly sacrificed to a fear lest the presence in the House of a body of ministers and placemen should affect the independence of members. A clause in the Act of Settlement excluded from the House of Commons all who held offices or places of profit under the Crown.

3. Not severed from House of Commons.

Happily this clause was repealed before it came into operation; and the parties in the House of Commons have gradually acquired the power of indicating, by a process which is somewhat indefinable in its action, though perfectly clear in its results, the ministers to whom they are willing that the conduct of affairs should be entrusted.

Cabinet supersedes Privy Council.

There were certain principles which needed to be established before Cabinet government, as we understand it, could assume even a rudimentary form. First among these was the recognition of the Cabinet as the advisers of the Crown and the connexion of the Cabinet with the political party dominant for the time in Parliament. Cabinets, or small groups of ministers specially favoured with the confidence of the Crown, had existed throughout the reigns of the last two Stuarts, of William and of Anne; but the supersession of the Council by the Cabinet as a deliberative body for purposes of executive action did not take place all at once; and it was only realized by degrees that this body must be of one mind on the great political issues of the time.[1]

[1] In The Crown, Part I, ch. ii, will be found worked out, in some

Another principle was that the King should act *through* and not *with* his Cabinet. The disuse of the royal presence at Cabinet meetings dates from the accession of George I, who probably found it disagreeable to attend discussions which he could not understand; and the absence of the King, while it enhanced the power of the ministers and their leader, completed the severance of the Cabinet from the Council. It ceased to be a meeting of the Lords of the Privy Council; it became a meeting of 'the King's servants', leaders of the party in power. Whatever may be the individual liabilities of the members of the Cabinet as heads of departments or members of the Privy Council, the collective Cabinet has no legal existence or legal liability. It is summoned by the Prime Minister, himself almost[1] unknown to the law; and its proceedings were, until the last few years, unrecorded, save in communications to the Crown in the form of Cabinet minutes or reports to the King by the Prime Minister of the transactions of a Cabinet meeting. Nor has the recent creation of a Cabinet secretariat, which prepares an agenda and records decisions, though it has invested the Cabinet with a more formal character, affected in any way its constitutional position; but it is perhaps too soon to forecast the direction which this development may ultimately take.

Disuse of royal presence.

Another principle, and this was of slow growth, was that of the joint responsibility of ministers. If a body of ministers stand or fall together, the influence of the Crown upon the working of government is obviously much diminished, and that of the Commons is increased. If the King should be dissatisfied with the working of a particular department he cannot now, as the King could

Joint responsibility of ministers.

detail, the early history of the Cabinet. It certainly did not grow out of any known Committee of the Privy Council, but was a small body of advisers for general purposes.

[1] The Legislature may be said now to have formally recognized the office by passing the Chequers Estate Act, 1917 (7 & 8 Geo. V, c. 55). This Act gives statutory effect to the gift of Lord and Lady Lee of Fareham of the Chequers Estate as an official residence for the Prime Minister, who is described by that title in the schedule to the Act, where the deed of gift is set out. The Prime Minister was first accorded a certain precedency by a Royal Warrant of December 2, 1905.

and did during the eighteenth century, dismiss the minister responsible for the department unless he has lost the confidence of his colleagues as well as of the Crown; to do so would bring about the retirement of the entire ministry. The Crown has to deal with a body of men who stand or fall together, because they represent common interests and the opinions of a party. They can only remain ministers while a majority of the House of Commons is willing to support their policy, and is not willing to support any other. They are collectively the nominees of that majority, or rather, of the majority of the electors who on the last occasion of a general election chose the party who should hold office until the time came for the country to reconsider its decision. They have, it is true, been summoned, and continue, to hold office by the pleasure of the Crown, but it is to the majority of the House of Commons, and not to the will of the Crown, that they look to enable them to retain their power. The dismissal of one minister, unless with the concurrence of his colleagues, would be regarded as an attack upon the policy which all represent.

Great Britain and Ireland.

The Acts of Union.

So far we have traced the development of Parliamentary institutions in England alone. It has to be borne in mind that the Acts of Union with Scotland and Ireland were treaties by which in each case two independent Parliaments merged their identity in a new Parliament upon certain terms as to representation in the two Houses; treaties by which two States, one enjoying complete independence, the other a legislative independence of England, were formed into a United Kingdom.

The Irish Parliaments.

But the relations between Great Britain and Ireland have again been profoundly modified by the Government of Ireland Act, 1920, and by still more recent events. So far as it is possible at present to see, there will still be a United Kingdom of Great Britain and Northern Ireland, with a common Parliament to which Northern Ireland will continue to send representatives; but Northern Ireland has now a

Parliament of her own, with legislative independence within certain defined limits. Thus for the first time a federal element is introduced into our constitution. Southern Ireland, on the other hand, is about to acquire complete legislative independence of Great Britain. There will be no longer the connexion of a common Parliament between them, but in its place the common sovereignty of the Crown, the outward symbol of that association of peoples known to the world as the British Empire.

The United Kingdom and the Empire.

Connexion of the dominions and colonies with the United Kingdom.

For the United Kingdom, the relations of whose parts and the conditions of whose government must be studied by the constitutional lawyer, has accumulated around itself a group of dominions, colonies, and dependencies, some the result of settlement, some of conquest, very variously constituted in themselves and standing in various relations to the central government. The self-governing dominion, the Crown colony, and the protectorate present a variety of type sufficient to satisfy the most eager curiosity as to the working of a great Imperial system. Our task is not done until we have made out the nature of the connexion between the component parts of the United Kingdom, and the working of the central executive in the United Kingdom and throughout the Empire. But in this volume we have to deal with the legislative sovereign of our Empire, the King in Parliament.

CHAPTER III

THE MEETING OF PARLIAMENT

Topics dealt with.

An endeavour has been made to define what is meant by the words 'Constitutional Law'; and a brief sketch has been given of the mode in which Parliament obtained its place in our constitution. As it is proposed to divide the subject of this treatise into two parts—Parliament and the Crown, or the Legislature and the Executive—we will now deal with Parliament.

Parliament and the Crown.

The meeting of Parliament.

First, we must get Parliament together and regard it as a whole, in respect of its summons, the setting in motion of its business, its adjournment, prorogation, and dissolution.

Constitution and privileges of the Houses.

Secondly, we must consider the constituent parts of the two Houses of Parliament, the Commons and the Lords; the process by which the members of either House attain to membership; the privileges which such membership confers upon the individuals, or which each House collectively enjoys.

Legislation.

Thirdly, we must trace the process of legislation as effected by the joint action of the two Houses, or by the action of the House of Commons under the Parliament Act.

The Crown in Parliament.

Fourthly, we must consider the part played by the Crown and its ministers in making laws and in communicating with the two Houses.

Interference of executive with legislature.

Fifthly, we must note as a matter of history, in order that we may understand the present relations of the Houses of Parliament and the Crown, the attempts made by the Crown, in the past, to interfere with or to influence the action of the Houses; and the encroachment by one branch of the Legislature upon the action of the rest.

The High Court of Parliament.

Lastly, we must deal with certain functions of Parliament, other than legislative, which may be conveniently included in the term 'the High Court of Parliament'.

§ 1. *Parties to Legislation.*

The parties to legislation.

Ordinarily there are three parties to legislation—the King, the Lords, and the Commons. Under the exceptional circumstances which may arise under the provisions of the Parliament Act, legislation is effected by the King and Commons alone. For if the Lords fail to pass a Money Bill within one month after it is sent up to that House; or if they refuse in three successive sessions to pass a Public Bill, other than a Money Bill, and if two years have elapsed between the dates at which it was read a second time in the first, and a third time in the last, of those sessions, then the Bill may be presented to the King for the royal assent though the Lords have not concurred in passing it. So the enacting clause of a statute usually runs thus :—

'Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :'

But it may also run thus :—

'Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of the Parliament Act, 1911, and by the authority of the same, as follows :'[1]

The process of legislation, and the part played by the Crown in making laws, will be dealt with later. Laws are made by an assembled Parliament, and by the concurrence of one House or both the Houses of which Parliament consists, and of the Crown.

Though Parliament may by statute delegate legislative powers, under such conditions as it chooses to impose, to a department of Government or to some public body, the power so given is limited by the terms of the statute and proceeds from the supreme legislature.

[1] As in the case of the Government of Ireland Act, 1914 (4 & 5 Geo. V, c. 90), and the Welsh Church Act, 1914 (4 & 5 Geo. V, c. 91). The former of these Acts, however, never came into operation and was subsequently repealed by the Government of Ireland Act, 1920 (10 & 11 Geo. V, c. 67) which was passed in the ordinary way.

The duties of Parliament.

The most striking attribute of Parliament is its legislative sovereignty, but the bodies of which Parliament consists are not summoned mainly, or even primarily, to make laws; legislation is only one of various functions which Parliament discharges. Members of either House may discuss all matters of national or imperial concern, and criticize the conduct of ministers; either House collectively may address the Crown on matters of general policy, may institute inquiries, in the public interest, into the conduct of persons or public bodies; while in the last resort Parliament may bring to justice a great political offender. But before we come to the functions of Parliament we must first ascertain who are invited to attend upon this Parliament, for what purposes and in what manner it is brought together, how its business is set in motion, and how it may be dismissed for a time or dissolved for good.

§ 2. *Who are summoned to Parliament.*

We need not consider the Assembly of the Wise under the Saxon monarchy, nor the Council of the Magnates under the Norman kings; it is enough that in times when the business of State was rather the declaration and enforcement of custom than the enactment of new laws or the changing of old ones, and when the King discharged in person the executive duties of government, he acted in concert with a body which, whether the qualification for membership was wisdom or property, advised, and to some extent controlled, his action.

The assembly of tenants-in-chief,

The Council of Magnates was expanded, upon occasion, into the Commune Concilium Regni, or the entirety of the tenants-in-chief, and the first formal provision for the summons of this assembly is to be found in the Magna Charta of 1215. In mode and object of summons we note some approach to the later Parliament.

as provided in Magna Charta.

In the twelfth section of the Charter, John promises that he will not levy scutage or aid other than the three recognized feudal aids, 'nisi per commune consilium regni.' And in the fourteenth section, the process of holding this Common Council is described. Archbishops, bishops, abbots, earls,

and greater barons are to be summoned individually, 'sigillatim per literas nostras.' The lesser tenants-in-chief are to be summoned 'in generali' by writs addressed to the sheriffs. The writs in all cases are to name the day and place of meeting, and the cause of summons. Forty days' notice, at least, is to be given, and on the day named the Council is to transact the business for which it has been summoned, whether or no it is attended by all to whom the summons is addressed.

How far this clause of Magna Charta expressed and formulated existing practice is not clear. It was omitted from subsequent confirmations of the Charter, and it may have been omitted as unnecessary because it was merely declaratory; or as unpopular with the barons who procured these confirmations because it was too stringent; or, lastly, it may have been omitted from no special design, but because other matters were more pressing at the time of the confirmations.

But though the clause exhibits, in the two modes of summons, the germ of the distinction between Lords and Commons, yet the assembly for which it provides differs obviously from the later Parliament.

How far different from the Parliament of Edw. I.

That assembly was not representative. The clergy are not summoned as an estate, nor are the Commons; the inferior clergy, the towns, and those freeholders of the shires who held of *mesne* lords have no place in the *commune concilium* of the Angevin kings.

Nor was it summoned for the purposes of a Parliament: the *commune concilium* was not called to advise the King generally, but merely to assent to the imposition of taxes, and of taxes of a special sort.

In fact the representative system had already begun, and the provisions of 1215 described an assembly of a type which was already passing away. The constitution of the shire moot or county court had always been representative, and the practice of representation had been applied to the kingdom at large in 1213. For to a council held in that year had been summoned 'four discreet men' of each county, to be sent up by the shire moot without reference to their tenure.

Shire representation, as opposed to representation of the tenants-in-chief, does not recur until 1254, when the regents of the kingdom (Henry III being in Gascony) summoned four knights from each shire, and representatives of the clergy from each diocese[1]. The towns were first represented in the famous Parliament of Simon de Montfort; and then through various assemblies, more or less completely representative of the various interests of the country, we reach 'the great and model Parliament', summoned by Edward I in 1295[2].

The model Parliament and who were summoned.

To this Parliament were summoned by special writ the archbishops, bishops, and abbots, and to the writ of summons of the two former was attached the *praemunientes* clause directing the attendance of the heads of cathedral chapters, of the archdeacons, and of proctors to represent the chapters and the parochial clergy. Special writs of summons were directed to seven earls and forty-one barons. And writs were addressed to the sheriffs bidding them cause to be elected two knights of each shire, two citizens of each city, two burgesses of each borough.

This Parliament was, in fact, to the kingdom what the full county court was to the shire, an assembly in which every class and every interest had a place. And so it was intended to be by the great King who had the skill and courage to adapt the organization of the county court to the requirements of the kingdom. 'What touches all', so ran the writ, 'should be by all approved.'

Thus we get a representation of the three estates[3] of the realm, the clergy, baronage, and commons, and their respective duties are defined in the writs which summon them. The clergy and baronage are summoned 'ad trac-

[1] Stubbs, Const. Hist. ii. (5th ed.) 69. The choice of two knights for each shire in 1220 in full county court for the assessment of a carucage illustrates the increased use of representation, though for assessment and not for grant. Stubbs, Select Charters (9th ed.), 349.

[2] Stubbs, Const. Hist. ii. (5th ed.) 133.

[3] Whether the Commons were summoned as an 'order' or 'estate' is perhaps doubtful. The theory of the 'three estates' seems to be of later date; but the expression itself is a convenient one. See on this subject, Pollard, ch. iv.

tandum ordinandum et faciendum', the commons 'ad faciendum quod tunc de communi concilio ordinabitur.'

The King in Council and the King in Parliament.

It must, however, be remembered that at the time when Edward I's Model Parliament was summoned, meetings of the King's Council in Parliament were being regularly held and continued to be held thereafter, in which the representatives of shire, city, and borough had no place. The representative assembly was still the exception and not the rule[1], and, as has been already pointed out, the departure of the representatives of the Commons from a session of the Council in Parliament did not necessarily interrupt the progress of business. So long as all the functions of government were performed by the same body, it is obvious that its meetings must have been regularly held, and that its personnel must have consisted largely of those who were in a position to give constant attention to the King's business. But as the distinction between judicial, administrative, and legislative functions becomes more clearly drawn, the King in Parliament is differentiated from the King in Council. The King in Council became the executive, the King in Parliament the legislature; the King's Council in Parliament passed into the House of Lords; and the representatives of the Commons, originally summoned to assent to taxation, and to give their advice when asked, developed into the House of Commons, the masters of the executive and the legislature alike. As soon as the spheres of executive and legislature become distinct from one another the meetings of Parliament grow less frequent, until the struggles of the seventeenth century; yet as its functions were more precisely defined and it began to voice the public opinion of the country, so did its influence and prestige increase.

The clergy drop out

The attendance of the clergy was always given reluctantly; they preferred to meet in their provincial convocations: there they granted taxes for their own estate, and the kings,

[1] 'During the latter half of Edward I's reign there is a process of amalgamation, and it is this amalgamation between "estates" and "parlement", rather than his addition of burgesses to the meetings of tenants-in-chief, that constitutes Edward's claim to be the creator of a model English parliament'. Pollard, Evolution of Parliament, p. 51.

since they got what they wanted from these assemblies, ceased to press for the attendance of the clergy in Parliament. They attended the Parliament of 1322 by which the sources of legislative power were defined, and yet they do not fall within the number of persons or bodies in whom that power was declared to reside. There is no evidence of their attendance from the end of the fourteenth century onward.

from legislation,

In 1664 the mode of granting money by subsidies to meet the extraordinary needs of State was abandoned, and the clergy ceased to offer separate subsidies to the Crown. In 1663, for the last time, they granted separate subsidies; in 1664 the Act which imposes the taxation of the year includes the clergy, but saves their right to tax themselves [1]; and henceforth no distinction is made in taxing clergy and laity, though the clergy are still summoned in the writs addressed to archbishops and bishops at the commencement of every Parliament. The change in the mode of taxing the clergy was not made with any general assent of Convocation; it was the result of an informal agreement between Archbishop Sheldon and Lord Chancellor Clarendon. The clergy acquired in return, by tacit consent, what they had not before enjoyed, the right to vote for knights of the shires, as freeholders, in respect of their glebes [2].

from taxation.

The history of the earlier period explains the forms of to-day.

Survival of early constitution of Parliament.

The King's Council in Parliament passed, as we have said, into the House of Lords, and carried with it certain privileges and duties attributable to its earlier stage of existence. It is not as a representation of the baronage but as members of the *Concilium regis* that the Peers are the hereditary counsellors of the Crown, and in their judicial capacity form an ultimate court of appeal. It is because they were once members of the *Concilium regis* that the judges are now

[1] 15 Car. 2, c. 10; 16 & 17 Car. 2, c. 1. s. 36.

[2] See as to the right of the clergy to vote, Commons' Journals, 9th May, 1624, 3rd November, 1641; Hatsell Precedents, vol. ii, p. 10 and note. The right was questioned as late as 1696. See Commons' Journals, 15th December, 1696.

summoned to advise, though not to sit as Peers of Parliament. The clergy are still summoned as an estate of the realm, though for centuries their summons has been a mere form. And the connexion of the representation of the Commons with the county court and the organization of the shire is still indicated by the part which the sheriff takes in county elections, while, down to the year 1872, such elections still took place in the county court, and the identity of the member and the powers conferred on him were testified by indentures to which the sheriff and the men of the county were parties.

We have now glanced as briefly as may be at the historical beginnings of Parliament, so as to learn what a Parliament is. It is an assemblage of the three estates of the realm, which one of the estates persistently declines to attend. It consists, therefore, of the baronage and commons summoned by the Crown.

§ 3. *Objects of Summons.*

Objects of summons:

We must now ask for what purposes Parliament is summoned, and in what manner.

in the middle ages;

The King, when he summoned a Parliament at the beginning of our Parliamentary history, had two distinct objects in view, neither of which would have been adequately attained without a representation of the estates as complete as was possible at that time. He wanted money, and he wanted to know what his people thought of his policy. It was for this reason that the writs to the sheriffs desire that the representatives of the commons may have ample power, 'ita quod pro defectu huiusmodi potestatis negotium infectum non remaneat.' Labour would be thrown away if the representatives granted an aid which their constituents repudiated. It was for this reason, too, that the Commons were consulted on questions of general administration and of peace and war. The King wanted to commit them to a policy which might prove expensive; but the Commons, though prepared to offer criticism and even advice, where advice would not compromise them,

money;

opinion.

declined to take over the responsibilities of the executive[1].

At the present day: financial;

The objects of summons at the present time are more complex. The Commons have entire control over the finances of the country: the revenues which accrue to the Crown, and can be dealt with independently of Parliament, would hardly carry on the business of government for a day. For a considerable part of the revenue depends on annual grant, but very little can be used without consent of Parliament; while Parliament appropriates, in every session, to the services for which it is required, the money which is placed, as it comes from the tax-payer, to the credit of the Government account at the Bank of England. Without such appropriation the money cannot be legally expended.

legislative;

And the need of legislation is now constant. Some Acts of Parliament, though necessary, are temporary and need to be renewed by annual enactment. This may be because they are experimental, or because, as in the case of the Army Act, it is expedient thus to limit the power given to the executive. Fresh legislation is incessantly demanded, and whereas mediaeval legislation, where it was not simply declaratory of custom, was scanty, and, to judge from the preambles of statutes, timid and even apologetic, modern legislation is restless, bold, and almost inquisitorial in its dealings with the daily concerns of life.

Nor does Parliament meet only to grant and appropriate supplies or to make laws. The discussion of matters of national importance, and the criticism of the action of ministers, the conflict of party, are the matters which in the public mind give an interest to the meeting of Parliament.

but, in form, deliberative.

The King when he calls a new Parliament makes no mention of the financial or legislatives duties which that Parliament is summoned to discharge. He calls it, 'being desirous and resolved as soon as may be to meet his people, and to have their advice in Parliament.' It is in fact for purposes of discussion primarily that Parliament is sum-

[1] Stubbs, Const. Hist. ii. (5th ed.) 634

moned. Its legislative activity has developed, since the form of the Royal Proclamation which calls it has become settled by custom.

§ 4. *Forms of Summons.*

Process of summons.

The existence of Parliament in modern times is kept as nearly continuous as possible, and hence the dissolution of one Parliament and the calling of another are effected by the same Royal Proclamation issued by the King on the advice of the Privy Council under the Great Seal.

Proclamation.

The Proclamation discharges the existing Parliament from its duties of attendance, declares the desire of the Crown to have the advice of its people, and the royal will and pleasure to call a new Parliament. It further announces an Order addressed by the Crown in Council to the Lord Chancellor to issue the necessary writs, and states that this Proclamation is to be his authority for so doing.

Order in Council.

Until recent times it was the practice for a warrant under the sign manual to be given by the Crown to the Chancellor to issue the necessary writs. This has ceased to be done: an Order in Council is made directing that writs shall be issued, but, as a matter of fact, the Royal Proclamation is treated by the Crown Office in Chancery as the authority for the issue. These writs will be presently described.

It may be convenient to set out here the form of Proclamation above described and of the Order in Council following upon it:

A Proclamation for Dissolving the present Parliament and Declaring the calling of Another.

GEORGE R.—Whereas We have thought fit, by and with the advice of Our Privy Council, to dissolve this present Parliament, which stands prorogued to day, the day of next, We do for that end publish this Our Royal Proclamation, and do hereby dissolve the said Parliament accordingly; and the Lords Spiritual and Temporal, and the Knights, Citizens, and Burgesses, and the Commissioners for shires and

burghs, of the House of Commons are discharged from their meeting and attendance on the said day, the day of next; and We, being desirous and resolved, as soon as may be, to meet Our people, and to have their advice in Parliament, do hereby make known to all Our loving subjects Our Royal will and pleasure to call a new Parliament; and do hereby further declare, that, with the advice of Our Privy Council, We have given order that Our Chancellor of that part of Our United Kingdom called Great Britain, and Our Chancellor of Ireland [1], do, respectively upon notice thereof, forthwith issue Our writs in due form, and according to law, for calling a new Parliament; and We do hereby also, by this Our Royal Proclamation under Our Great Seal of Our United Kingdom, require writs forthwith to be issued accordingly by Our said Chancellors respectively, for causing the Lords Spiritual and Temporal and Commons, who are to serve in the said Parliament, to be duly returned to, and to give their attendance in, Our said Parliament; which writs are to be returnable on day, the day of next. Given at Our Court at , this day of , in the year of our Lord 19 , and in the year of Our Reign. God save the King.

Order in Council for the Issue of Writs.

At the Court at , the day of , 19 .

Present, the King's Most Excellent Majesty in Council.

His Majesty having been this day pleased by His Royal Proclamation to dissolve the present Parliament and to declare the calling of another, is hereby further pleased, by and with the advice of his Privy Council, to order that the Right Honourable the Lord High Chancellor of that part of the United Kingdom called Great Britain, and the Right Honourable the Lord Chancellor of Ireland,[1] do respectively, and upon notice of this His Majesty's order, forthwith cause writs to be issued in due form and according to law for the calling of a new Parliament, to meet at the city of Westminster; which writs are to be returnable on day, the day of , 19 .

[1] By s. 44 (2) of the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67) the Lord Lieutenant of Ireland became the Keeper of the Great Seal of Ireland in place of the Lord Chancellor of Ireland, whose executive functions were transferred to the Lord Lieutenant. It would appear therefore that the Proclamation and Order in Council will not in any event refer in the future to the Lord Chancellor of Ireland.

The writs were returnable, according to the provisions of Magna Charta, within forty days of their issue; this period was extended after the union with Scotland to fifty days, and has now been reduced, in view of the greater ease of communication, to twenty days [1].

The writs issued from the Crown Office are addressed to five different classes of persons: to the temporal peers of England, to the spiritual peers of England, to the twenty-eight temporal peers of Ireland, to the judges of the High Court of Justice, the Attorney- and Solicitor-General, and to the returning officers of places entitled to elect members to serve in Parliament.

Five classes summoned.

The writs are in the following forms:

Writ of Summons to a Temporal Peer of England.

Writ to Temporal Peer.

George the Fifth by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith; to Our ——'—— Greeting. Whereas by the advice and consent of Our Council for certain arduous and urgent affairs concerning Us, the State and defence of Our said United Kingdom and the Church, We have ordered a certain Parliament to be holden at Our city of Westminster on the day of next ensuing [2], and there to treat and have conference with the Prelates, Great Men, and Peers of our Realm. We strictly enjoining command you *upon the faith and allegiance by which you are bound to Us* that the weightiness of the said affairs and imminent perils considered (waiving all excuses) you be at the said day and place personally present with Us and with the said Prelates, Great Men, and Peers, to treat and give your council upon the affairs aforesaid. And this as you regard Us and Our honour and the safety and defence of the said United Kingdom and Church and dispatch of the said affairs in no wise do you omit. Witness Ourself at Westminster the day of in the year of our Reign.

To ——. A writ of summons to Parliament the day of next.

[1] Representation of the People Act, 1918 (7 & 8 Geo. 5, c. 64), s. 21 (3).

[2] This part of the writ is varied where it is issued after the session has begun, as in the case of a newly-created peer or of a peer succeeding to a title.

Writ of Summons to a Spiritual Peer (with Praemunientes clause).

Writ to Spiritual Peer.

George the Fifth by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, to the [Right] Reverend Father in God Greeting. Whereas by the advice and assent of Our Council for certain arduous and urgent affairs concerning Us the State and defence of Our said United Kingdom and the Church, We have ordered a certain Parliament to be holden at Our city of Westminster on the day of next ensuing, and there to treat and have conference with the Prelates, Great Men, and Peers of Our Realm, We strictly enjoining command you *upon the faith and love by which you are bound to Us* that the weightiness of the said affairs and imminent perils considered (waiving all excuses) you be at the said day and place personally present with Us and with the said Prelates, Great Men, and Peers, to treat and give your council upon the affairs aforesaid. And this as you regard Us and Our honour and the safety and defence of the said United Kingdom and Church and dispatch of the said affairs in nowise do you omit. [1] Forewarning the Dean and Chapter of your Church of —— and the Archdeacons and all the Clergy of your Diocese that they the said Dean and Archdeacon in their proper persons and the said Chapter by one and the said Clergy by two meet Proctors severally, having full and sufficient authority from them the said Chapter and Clergy, at the said day and place to be personally present to consent to those things which then and there by the Common Council of Our said United Kingdom (by the favour of the Divine Clemency) shall happen to be ordained. Witness Ourself at Westminster the day of in the year of our Reign.

Praemunientes clause.

To ——. A writ of summons to Parliament, to be holden the day of next.

The writ of summons to an Irish Representative peer follows the form of the writ addressed to the peer of Great Britain, after first reciting the fact that the peer summoned had been duly elected in pursuance of the provisions of the Act of Union.

[1] The praemunientes clause is omitted in a summons issued after the session has begun, and the wording of the summons in such case is slightly different.

Writ of attendance addressed to the Judges, and the Attorney- and Solicitor-General [1].

Writ to judge, &c.

George the Fifth, &c., to Our trusty and well beloved —— Greeting. Whereas by the advice and assent of Our Council for certain arduous and urgent affairs concerning Us, the State and defence of Our said United Kingdom and the Church, We have ordered a certain Parliament to be holden at Our city of Westminster on the day of next ensuing and there to treat and have conference with the Prelates, Great Men, and Peers of Our Realm. We strictly enjoining command you that (waiving all excuses) you be at the said day and place personally present with Us and with the rest of Our Council to treat and give your advice upon the affairs aforesaid, and this in no wise do you omit.

Witness Ourself at Westminster, &c.

Writ addressed to the Sheriff or Returning Officer of a county or borough for the election of a member of the House of Commons.

Statutory writ to Sheriff.

George the Fifth by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, to —— Greeting. Whereas by the advice of Our Council We have ordered a Parliament to be holden at Westminster on the day of next, We command you that, notice of the time and place of election being first duly given, you do cause election to be made according to law of [*one*] member to serve in Parliament for ——. And that you do cause the name of such member when so elected, whether he be present or absent, to be certified to Us in Our Chancery, without delay.

Witness Ourself at Westminster the day of in the year of Our Reign and in the year of our Lord One thousand nine hundred and .

To ——. A writ of a new election of —— member for the said ——. 35 & 36 Vict. c. 33.

As to these writs we may note the following points:

1. Proclamations, writs of summons and attendance, and writs for the election of members to serve in Parliament,

[1] Formerly a 'King's Serjeant' was appointed by letters patent from among the serjeants-at-law, and received a writ of attendance with the judges and law officers.

are authenticated by the Great Seal. But in Great Britain the Great Seal is for these purposes represented by 'an impression to be taken in such manner, and of such size or sizes, on embossed paper, wax, wafer, or any other material' as a Committee of the Privy Council may from time to time prescribe[1].

Scotch peers.

2. The Scotch representative peers do not receive a writ of summons; their election is made in pursuance of a separate Proclamation, in a manner which is described hereafter; it is certified by the Lord Clerk Register of Scotland to the clerk of the Crown in Chancery, and by him to the clerk of the House of Lords.

Irish peers.

3. The mode of election of the Irish representative peers will be dealt with hereafter.

Temporal and Spiritual peers.

4. The temporal peers are summoned as in the mediaeval writs 'on their faith and allegiance', and the spiritual peers in like manner 'on their faith and love', and in other respects the writs of to-day differ little if at all from those of four hundred years ago.

Praemunientes clause.

5. The Praemunientes clause by which the Bishop is instructed to summon the clergy of his diocese to be present and consent to that which Parliament may ordain still recognizes the position of the clergy as an estate of the realm, and it must be distinguished carefully from the summons to Convocation, an exclusively clerical assembly, of which more hereafter.

Judges' summons.

6. The Judges, and the Attorney- and Solicitor-General, are summoned, but in an inferior capacity. Their writs are writs 'of *Attendance*' not 'of *Summons*.' They are not invited to be present '*with* the said Prelates, Peers, and Great Men,' but 'with Us and with the rest of Our Council to treat and give your advice.'

It is in virtue of this writ of attendance that the Judges are called upon to give their opinions on difficult points of law which come before the House of Lords as a Court of

[1] This is done in pursuance of rules made under the provisions of the Crown Office Act, 1877. Commons' Papers, 1878 (87), lxiii. 177. Irish writs are still authenticated by a solid piece of wax bearing a portion of an impression of the Great Seal in use in Ireland.

Appeal. But they do not come as Peers of Parliament, and recent procedure in the matter of their summons shows that it is regarded rather as an obligation than as a dignity.

For before the Judicature Act the summons, by long custom, was limited to the judges of the old Common Law courts, the Chief Justices and puisne judges of the Queen's Bench and Common Pleas, and the Chief Baron and Barons of the Exchequer.

Since the Judicature Act the summons is extended to all the judges of the High Court of Justice, and to the Lords Justices of Appeal. But this writ would not be issued to a judge who was entitled to be summoned as a temporal peer.

Dispatch of writs.

7. The writs addressed to returning officers for the election of members of the House of Commons must be delivered by the messenger of the Great Seal or his deputy to the Post Office (except such as are addressed to the sheriffs of London and Middlesex), and must be dispatched free of charge, by post[1].

8. The writs are in a modern form provided by the Ballot Act of 1872. But the form of writ which was in use until that date, shows how near we still are to the constitutional forms of the middle ages, and indicates, more clearly than the abbreviated modern writ, the objects of summons.

Writ addressed to the Sheriff of Middlesex
17th July, 1837.

Common law writ to Sheriff.

Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of the County of Middlesex, Greeting. Whereas by the advice and assent of our Council, for certain arduous and urgent affairs concerning Us, the State and defence of Our said United Kingdom and the Church, We have ordered a certain Parliament to be holden at Our city of Westminster on the 4th day of September next ensuing. *And there to treat and have conference with* the

[1] 53 Geo. 3, c. 89. This prevents a returning officer from sending for the writ in order to accelerate the nomination and poll. Official telegraphic information of a writ having been issued is, however, allowed to be given in such cases as may be directed by Order in Council and may be acted on accordingly: Representation of the People Act, 1918, s. 21 (2).

Prelates, Great Men, and Peers of Our Realm, We command and strictly enjoin you (Proclamation hereof, and of the time and place of election being first duly made) for the said COUNTY *two Knights of the most fit and discreet, girt with swords*, and for the *City* of Westminster, in the same County, *two Citizens*, and for each of the *Boroughs* of the Tower Hamlets, Finsbury, and Marylebone, in the same County, *two Burgesses* of the most sufficient and discreet, freely and indifferently by those who at such election shall be present according to *the form of the Statutes* in that case made and provided, you cause to be elected; and the names of such Knights, Citizens, and Burgesses so to be elected, whether they be present or absent, you cause to be inserted in certain Indentures to be thereupon made between you and those who shall be present at such election, and then at the day and place aforesaid you cause to come in such manner that the said Knights for themselves, and the Commonalty of the same County, and the said Citizens and Burgesses for themselves, and the Commonalty of the said City and Boroughs respectively, may have from them *full and sufficient power to do and consent to those* things which then and there by the Common Council of Our said United Kingdom (by the blessing of God) shall happen to be ordained upon the aforesaid affairs, So that *for want of such power* or *through an improvident election* of the said Knights, Citizens, or Burgesses the aforesaid affairs may in no wise remain unfinished. Willing nevertheless that *neither you nor any other Sheriff of Our said Kingdom be in any wise elected.* And the election so made distinctly and openly under your seal and the seals of those who shall be present at such election, *certify you to Us in Our Chancery*, at the day and place aforesaid, remitting to Us one part of the aforesaid indentures annexed to these presents, together with this writ. Witness Ourself at Westminster the 17th day of July in the 1st year of our reign.

To the Sheriff of the County of Middlesex. Writ of election to Parliament to be holden the 11th day of September next.

The Sheriff thereupon issued precepts to the bailiff of the 'Liberty of the Dean and Chapter of the Collegiate Church of St. Peter at Westminster,' and to the Returning Officers of the boroughs, and the precepts were returned to him when the elections were duly made; the county election took place in the county court, and the return

was sent, together with the returns from the city and boroughs, to the Crown Office in Chancery.

Indentures.

These returns were in all cases accompanied by indentures, to which the Returning Officer and a number of electors were parties. These indentures were required by Acts of Henry IV and Henry VI[1], and their object was to secure that the persons returned by the Sheriff were in truth the persons elected by the constituencies. They followed closely the terms of the writ, and the terms of the writ, being the same or nearly the same as in the early days of representation, were express in the requirement that the person returned should have full power to bind the constituency. The indenture therefore at first sight creates the impression that its main purpose was to constrain the electors to abide by the acts and promises of their representative done on their behalf. But in fact the object of the indenture, as may be seen from the statute which required it, was to secure the identity of the person elected with the person returned.

Thus much as to the mode in which a Parliament is summoned. We have next to see how it is brought together and its business set in motion.

§ 5. *The opening of Parliament.*

The assembling of the House.

The Parliament meets on the day appointed in the Proclamation of summons. The Sovereign is not usually present at the opening of a new Parliament, but issues a commission under the great Seal for that purpose. The Houses assemble in their respective chambers, and the Commons are summoned to the House of Lords. There the letters patent constituting a commission for the opening of Parliament are read, and the Lord Chancellor desires the Commons to choose a Speaker.

Of the Speaker we shall have more to say presently. It is enough here to note that he is not only chairman of the Commons for the purpose of maintaining order and declaring or interpreting the rules of the House, but also the spokesman and representative of the House for

[1] 7 Hen. 4, c. 15; 23 Hen. 6, c. 14.

the purpose of communications made in its collective capacity to the Crown.

Election of Speaker.

The Commons retire to choose their Speaker, the formal business of the chair being, for the purposes of the election, discharged by the Clerk of the House. On the election being made the Speaker takes the chair, and the mace, the symbol of his office, is laid before him on the table.

The House adjourns until the following day, and then the Speaker takes the chair until summoned by the officer of the Lords to the presence of the Lords Commissioners. He goes to the bar of the House of Lords with the members of the Commons, announces his election, and 'submits himself with all humility to his Majesty's gracious approbation'.

The Lord Chancellor expresses the approval by his Majesty of the choice of the Commons, and confirms him as Speaker. After this is done he demands the 'ancient and undoubted rights and privileges of the Commons.' These are granted, and the Speaker with the Commons returns to the Lower House.

There are two things to consider before we come to the declaration by the King of the objects of summons in the speech from the Throne.

Evidence of membership.

(*a*) The first is the evidence by which the members of the two Houses can establish their rights to membership.

(*b*) The second is the perfecting of the title to sit.

(*a*) In the Lords those who have received writs of summons present them at the table of the House, the roll of those entitled, as hereditary peers of England, to receive writs, being delivered by the Garter King at Arms. The title of the representative peers of Scotland is evidenced by a certificate delivered by the Clerk of the Crown of a return made to him by the Lord Clerk Register of Scotland. Garter King at Arms delivers at the table of the House a list of the Lords Temporal, and the list is ordered to lie upon the table. A new peer presents his patent to the Lord Chancellor at the Woolsack, and this, together with his writ of summons, is read by the Clerk of the House.

In the Commons the Clerk of the House receives from

the Clerk of the Crown a book containing a list of the returns made to the writs issued, and this is the sole evidence furnished to the House. The returns themselves are retained in the Crown Office during the continuance of a Parliament in case reference should be required to be made to them. After this they are transferred to the Record Office.

Perfecting of title to sit.

(*b*) The second is the perfecting of the title of a member to discharge the duties of his office, and for this it is necessary in both Houses that an oath of allegiance should be taken or a declaration made to the same effect.

The oath.

It had been customary for members of both Houses of Parliament to take the oath of allegiance from the year 1534 onwards, and the oath of supremacy from the year 1558.

The oath of supremacy was required to be taken by the Commons in the fifth year of Elizabeth, and the oath of allegiance in the seventh year of James I, but these oaths were taken before the Lord Steward sitting in the Court of Requests. It was not until the thirtieth year of Charles II that they were prescribed to be taken by both Houses and in Parliament. By an Act of that year the Lords and Commons in their respective Houses were to take and subscribe the oaths of allegiance and supremacy before they were entitled to sit and vote[1]. The form of the oath has undergone various changes. As provided by the Promissory Oaths Act, 1868,[2] it runs thus :—

1562–3.

1609–10.

1678.

Its form.

I —— do swear that I will be faithful and bear true allegiance to his Majesty King George the Fifth his heirs and successors according to law. So help me God.

But Acts have been passed from time to time for the relief of persons to whom the form of oath, or the taking of an oath, was objectionable : and finally, since 1888, the Oaths Act[3] enables any person to make affirmation in all cases wherein an oath is required, on stating either that he has no religious belief or that it is contrary to his religious belief to take an oath.

[1] The Statutes are 5 Eliz. c. 1, s. 16 ; 7 James 1, c. 6 ; 30 Car. 2, st. 2, c. 1.
[2] 31 & 32 Vict. c. 72.
[3] 51 & 52 Vict. c. 46, s. 1.

As regards the time of taking the oath: when a new Parliament meets, the Lords take the oath as soon as the Parliament has been opened; the Commons as soon as the Speaker has been approved by the Crown, and has himself taken the oath. On the election of a member during the continuance of a Parliament he is entitled to take the oath as soon as the certificate of his return has reached the Clerk of the House.

The oath may be taken in the House of Lords at any convenient time, when the House is sitting either for judicial or other business; usually it is taken before ordinary business begins. In the Commons it may be taken at any time of the day that a full House is sitting, and before it has entered upon the Orders of the day.

Result of failure to take it.

It should be noted that a failure to take the oath prevents a member of the House of Commons from sitting and voting as a member of the House, but that he is none the less a member as regards his constituency, and that he is for some purposes a member of the House of Commons. His seat is not vacant, and he is capable of discharging all the duties and enjoying all the rights of a member short of sitting within the bar of the House, taking part in its debates, and voting in its divisions[1]. When the Houses are duly constituted by the completion of the forms described, Parliament is prepared to hear the causes for which it is summoned.

At the commencement of a session which is not also the commencement of a Parliament the proceedings relating to the election of a Speaker and the taking of the oath are not needed, and the Houses are at once informed of the causes of summons.

Opening by King in person;

The King, if he meets Parliament in person, goes in state to the House of Lords, and takes his seat upon the throne; the Lord Chamberlain is bidden to desire the Usher of the Black Rod, the officer of the House, to *command* the atten-

[1] Mr. Speaker Lowther in 1917, having been advised by the Law Officers that there was no statutory enactment fixing the time at which a member's salary became payable, ruled that it was only payable from the time when the member qualified himself to perform his duty as a member by taking and subscribing the oath: 90 Parl. Deb. 5th ser., 1691.

dance of the Commons. The Commons, with the Speaker at their head, come to the bar of the House of Lords, and the King reads his speech to the House, in which he informs them of the business to be laid before them.

by Commission.

When Parliament is opened by commission, the Lords Commissioners in like manner bid the officer of the House to *desire* the attendance of the Commons, and the speech is read by the Lord Chancellor acting under the commands of the Crown. The Houses adjourn, and when they reassemble proceed to the consideration of the Speech from the Throne; but before doing so they assert their right to deal with other matters than those referred to in the speech, by reading a Bill for the first time *pro formâ*[1]. The speech is then read again in each House, and in each House it is moved that an address be made in answer.

To this address amendments may be moved, and thus the general policy of the Government, as indicated by the Speech from the Throne, is brought under discussion.

Each House, when its address has been agreed to, orders it to be presented to the King, but the formalities as to the mode of presentment need not be dealt with here[2].

It may give more reality to the details of procedure if extracts are set out from the Journals of the Houses describing the forms of opening Parliament in the year 1919.

On the first assembling of the House of Lords,[3]

The Lord Chancellor acquainted the House, that it not being convenient for His Majesty to be personally present here this day, he had been pleased to cause a Commission under the Great Seal to be prepared in order to the holding of this Parliament.

The House adjourned during pleasure.

The House was resumed.

Summons of Commons.

Then five of the Lords Commissioners, being in their robes, and seated on a form placed between the Throne and the Woolsack, the Lord Chancellor in the middle, with the Lord Privy Seal

[1] In the House of Lords this bill is usually one entitled a bill 'for the better regulating of Select Vestries', in the House of Commons a bill 'for the better preventing of Clandestine Outlawries'.

[2] May, Parliamentary Practice (ed. 12), 163, and see *post*, p. 72.

[3] 151 Lords' Journals, 20.

and the Lord Chamberlain on his right hand, and the Lord Steward and the Viscount Hutchinson (Earl of Donoughmore) on his left, commanded the Gentleman Usher of the Black Rod to let the Commons know, 'The Lords Commissioners desire their immediate attendance in this House, to hear the Commission read.'

Who being come, with their Speaker; the Lord Chancellor said—

'My Lords and Gentlemen,

Powers of Commission.

'We are commanded by His Majesty to let you know, that it not being convenient for Him to be present here this day, in His Royal person, He hath thought fit, by Letters Patent under the Great Seal, to empower His Royal Highness the Duke of Connaught and Strathearn and several Lords therein named to do all things, in His Majesty's name, which are to be done on His Majesty's part in this Parliament, as by the Letters Patent will more fully appear.'

Then the said Letters Patent were read by the Clerk. * * *

Then the Lord Chancellor said—

'My Lords and Gentlemen,

Direction to elect Speaker.

'We have it in command from His Majesty to let you know, that as soon as the members of both Houses shall be sworn, the causes of His Majesty's calling this Parliament will be declared to you; and it being necessary a Speaker of the House of Commons should be first chosen, it is His Majesty's pleasure that you, gentlemen of the House of Commons, repair to the place where you are to sit, and there proceed to the choice of some proper person to be your Speaker; and that you present such person whom you shall so choose, here, to-morrow, at a quarter before three o'clock, for His Majesty's royal approbation.'

We will now change the scene to the House of Commons, to which the members of that House returned[1].

Election of Speaker.

Colonel the Right Honourable Francis Bingham Mildmay, addressing himself to the Clerk (who, standing up, pointed to him and then sat down), proposed to the House, for their Speaker, the Right Honourable James William Lowther; and moved, 'That the Right Honourable James William Lowther do take

[1] 174 Commons' Journals, 5.

the chair of this House as Speaker ' ; which motion was seconded by the Right Honourable Sir James Henry Dalziel.

The House then unanimously calling Mr. James William Lowther to the Chair, he stood up in his place, and expressed the sense he had of the honour proposed to be conferred upon him, and submitted himself to the House.

The House then having again unanimously called Mr. James William Lowther to the Chair, he was taken out of his place and conducted to the Chair by Colonel Mildmay and Sir James Henry Dalziel ; and, standing on the upper step, he expressed his deep sense of the very great honour which the House had been pleased to confer upon him, and sat down in the Chair.

Then the Mace (which before lay under the Table) was placed upon the Table.

Whereupon Mr. Bonar Law and Sir Donald Maclean, Mr. Adamson, and Mr. Clement Edwards congratulated Mr. Speaker-elect, and Mr. Bonar Law moved, ' That this House do now adjourn.'

Mr. Speaker-elect thereupon put the question, which being agreed to ;

The House adjourned accordingly at eight minutes past four of the clock till to-morrow, and Mr. Speaker-elect went away without the Mace before him.

On the following day, the 5th of February, the Lords met, and five of the Lords Commissioners being seated as before again sent to the Commons to desire their immediate attendance in this House.

Who being come ;

The Right Honourable James William Lowther (Speaker-elect) said—

' My Lords,

' I have to acquaint your Lordships that in obedience to His Majesty's commands, His Majesty's most faithful Commons have, in the exercise of their undoubted rights and privileges, proceeded to the election of a Speaker, and that their choice has fallen upon myself. I now present myself at your Lordships' bar, and submit myself with all humility for His Majesty's gracious approbation.'

Then the Lord Chancellor said—

' Mr. Lowther,

'We are commanded to assure you that His Majesty is so

Approval of Speaker.

fully sensible of your zeal in the public service, and of your ample sufficiency to execute the arduous duties which His faithful Commons have selected you to discharge, that he does most readily approve and confirm you as their Speaker.'

Then Mr. Speaker said—

'My Lords,

Demand of privileges.

'I submit myself with all humility and gratitude to His Majesty's gracious commands. It is now my duty, my Lords, in the name and on behalf of the Commons of the United Kingdom, to lay claim by humble petition to His Majesty to all their ancient and undoubted rights and privileges, especially to freedom of speech in debate, to freedom from arrest[1], and to free access to His Majesty whenever occasion shall require, and that the most favourable construction shall be put upon all their proceedings. With regard to myself I humbly pray that if in the discharge of my duties I shall inadvertently fall into any error, the blame may be imputed to myself alone, and not to His Majesty's faithful Commons.'

Then the Lord Chancellor said—

'Mr. Speaker,

'We have it further in command to inform you that His Majesty doth most readily confirm all the rights and privileges which have ever been granted to or conferred upon the Commons by any of His Royal Predecessors.

'With respect to yourself, Sir, although His Majesty is sensible that you stand in no need of such assurance, His Majesty will ever put the most favourable construction upon your words and actions[2].'

Then the Commons withdrew.

We will again follow them to their own House, whither being returned :—

Report of Speaker.

Mr. Speaker reported—That the House had been in the House of Peers, where His Majesty was pleased by His Majesty's Commissioners to approve of the choice the House had made of him to be their Speaker; and that he had in their name and on their behalf, by humble Petition to His Majesty, made claim to all

[1] This privilege formerly extended to the *estates* and the *servants* of members. The claim for estates was abandoned by Mr. Speaker Denison in 1857, the claim for servants by Mr. Speaker Peel in 1892.

[2] 151 Lords' Journals, 24.

their ancient and undoubted rights and privileges, particularly to freedom of speech in Debate, freedom from arrest, freedom of access to His Majesty whenever occasion may require; and that the most favourable construction should be placed upon all their proceedings; which he said His Majesty, by His said Commissioners, had been pleased to confirm to them in as ample a manner as they have ever been granted or confirmed by His Majesty, or any of His Royal Predecessors.

And then Mr. Speaker repeated his very sincere thanks to the House for the great honour that they had done him.

Mr. Speaker then put the House in mind that their first duty was to take and subscribe the Oath required by Law.

Taking of Oath.

Thereupon Mr. Speaker first, alone, standing upon the upper step of the Chair, took and subscribed the Oath[1].

Then several Members took and subscribed the oath, and several Members made and subscribed the Affirmation required by law.

And then the House adjourned till to-morrow.

On the 19th of February, in the House of Lords,

His Majesty being seated on the Throne adorned with His Crown and Regal Ornaments, and attended by His Officers of State (the Lords being in their robes) commanded the Gentleman Usher of the Black Rod, through the Lord Great Chamberlain, to let the Commons know, 'It is His Majesty's pleasure they attend Him immediately in this House,' who being come with their Speaker, His Majesty was pleased to speak as follows.

Speech from the Throne.

The King then delivered his speech, after which His Majesty was pleased to retire.

The Commons withdrew to their House, transacted various matters of formal business, and read a first time the Clandestine Outlawries Bill, after which

Bill read a first time

Mr. Speaker reported His Majesty's Speech and read it to the House.[2]

[1] 174 Commons' Journal, 5.

[2] 174 Com. Journ. 21. The actual words of the Speaker, following precedent, were these: 'I have to acquaint the House that this House has this day attended His Majesty in the House of Peers, and His Majesty was pleased to make a most gracious speech to both Houses of Parliament, of which, for greater accuracy, I have obtained a copy, which is as followeth.' 112 Parl. Deb. 5th ser. 47.

Address in answer.

The address as made in answer to the King's Speech in either House calls for no comment. When settled and approved the Lords ordered their address to be presented to His Majesty by 'the Lords with White Staves[1];' the Commons' address was to be presented 'by such members of this House as are of His Majesty's most honourable Privy Council.'

§ 6. *Adjournment, Prorogation, Dissolution.*

We have now brought Parliament to the stage at which it is fully constituted, opened, and ready to transact business. The nature of this business and the mode in which it is transacted shall be dealt with later. But having brought our Parliament into existence, it is important to know how that existence can be terminated; having put it into a position to transact business, it is important to know how that business can be stopped.

A dissolution brings the existence of Parliament to an end; a prorogation brings the session of Parliament to an end; an adjournment brings about a cessation of the business of one or other House for a period of hours, days, or weeks.

Adjournment.

The adjournment of either House takes place at its own discretion, unaffected by the proceedings of the other House. Business pending at the time of the adjournment is taken up at the point at which it dropped when the House meets again. The Crown cannot make either House adjourn: it has sometimes signified its pleasure that the Houses adjourn, but there is no reason why its pleasure should also be the pleasure of the Houses. The Crown has, however, a statutory power[2] to call upon Parliament to meet before the conclusion of an adjournment contemplated where both Houses stand adjourned for more than fourteen days. The power is exercised by Proclamation declaring that the Houses shall meet on a day not less than six days from the date of the Proclamation.

[1] The lords who hold office in the royal household.

[2] 39 & 40 Geo. 3, c. 14, as amended by the Meeting of Parliament Act, 1870 33 & 34 Vict. c. 81).

Prorogation takes place by the exercise of the royal prerogative; it ends the session of both Houses simultaneously, and terminates all pending business. A bill which has passed through some stages, but is not ripe for the royal assent at the date of prorogation, must begin at the earliest stage when Parliament is summoned again, and opened by a speech from the throne. Prorogation is effected at the end of a session either by the King in person or by Royal Commission. In the former case the King's commands are announced, in his presence, to both Houses, by the Speaker of the House of Lords; in the latter a like announcement is made by the Commissioners. Prorogation, form of.

The prorogation is to a specified date, but it may be necessary either to postpone or to accelerate the meeting of Parliament.

When prorogation postpones the meeting of a new Parliament to a later date than that for which it had been summoned, a Writ was formerly addressed to both Houses. When the Crown extends the prorogation of a Parliament which has already met, it was the practice to issue a Commission for the purpose. The writ or commission was read by the Chancellor to a clerk who represented the House of Commons. Since 1867[1] a postponement as well as an acceleration of the meeting of Parliament may be ordered by proclamation.

The power to accelerate the meeting of a Parliament which has been prorogued is given by statute: an Act of 1797 empowered the King to advance the meeting from the date to which prorogation had taken place to one not earlier than fourteen days from the date of the proclamation, and this period is reduced to six days by an Act of 1870[2].

The form of a proclamation which merely postpones the meeting of Parliament runs thus:—

GEORGE R.,

Whereas Our Parliament stands prorogued to the day of instant; We, by and with the advice of Our Privy Council, hereby issue Our Royal Proclamation, and publish and

[1] 30 & 31 Vict. c. 81.

[2] 37 Geo. 3, c. 127, and 33 & 34 Vict. c. 81.

declare that the said Parliament be further prorogued to , the day of , One thousand nine hundred and . Given at Our Court at this day of in the year of our Lord 19 and in the year of Our reign.

God save the King.

When the date fixed is the date at which the session is intended to commence, the following words are added :—

And We do hereby further, with the advice aforesaid, declare Our royal will and pleasure that the said Parliament shall on the said the th day of 19 , assemble and be holden for the dispatch of divers urgent and important affairs : and the Lords spiritual and temporal, and the knights citizens and burgesses and the Commissioners for shires and burghs of the House of Commons are hereby required to give their attendance accordingly on the said day of 19 .

Dissolution.

The dissolution of a Parliament may be effected either by an exercise of the royal prerogative, or by efflux of time. When the King exercises his prerogative he may do so in person, should Parliament be sitting, or if not in person by Royal Commission. If Parliament is not sitting, but stands prorogued, it is dissolved by proclamation in the manner described on an earlier page.

By prerogative.

The usual practice, if Parliament is sitting, is for the King to prorogue it first and then issue a proclamation in the form set out on a preceding page.

Thus on the 24th of March, 1880, Parliament was prorogued by Royal Commission until the 13th of April, and on the evening of the same day a proclamation was issued discharging the members of the two Houses from attendance on the 13th of April, and dissolving the Parliament.

By efflux of time.

Efflux of time dissolves Parliament. This was not so until 1694. The King could keep a Parliament in existence as long as he pleased, and Charles II retained for seventeen years the Parliament called at his accession. Events showed that a House of Commons, if it was kept in being for so long a time after its election, might cease to represent the people ; and that if the House depended wholly on the Crown for the continuance of its existence it might be too ready to

favour the policy of the Court. For this and other reasons the Bill for Triennial Parliaments was passed by both Houses in 1693, but William withheld his assent until the Bill came before him again in the following year. It then became law, and so until the beginning of the reign of George I the law stood. Within six months of the death of Anne—that is, early in the year 1715—the Parliament which had been in existence at the date of her death was dissolved; but when the new Parliament had been in existence little more than a year, it became clear that the operation of the Triennial Act might produce serious inconvenience, if not actual disaster. The succession to the Crown was in dispute, rebellion was still smouldering in the north, and there was risk of an invasion. Under these circumstances, and not perhaps from any theoretical preference for septennial over triennial elections, Parliament prolonged its own existence to a term of seven years. This was done by the Septennial Act, and was the rule until the passing of the Parliament Act, 1911. Parliament, if not sooner dissolved by royal prerogative, will henceforth expire by the efflux of time at the end of five years[1].

The Triennial Act.

The Septennial Act.

The Parliament Act.

Until 1867 the existence of Parliament was affected by the demise of the Crown. The King summoned the estates of the realm, by writ, to confer with him; when he died the invitation lapsed, and the Parliament was dissolved. The theory was not unreasonable, though the practice was inconvenient. For whatever may have been the law or the practice of early Teutonic societies as to the assemblage of the people, our representative institutions took their origin from the King's invitation to the estates to appear in person, or by their representatives, to advise, assent, or enact. It was natural that the invitation should lapse and the assembly disperse when he who summoned it had died; for the mediaeval Parliaments

Effect of demise of Crown.

[1] A Bill which extends the duration of Parliament is excepted from the provisions of the Parliament Act and must have the assent of the Lords. Bills for extending the duration of the Parliament then sitting were passed on more than one occasion during the late war: see, e. g., the Parliament and Registration Act, 1916 (5 & 6 Geo. 5, c. 100) and the Parliament and Local Elections Act, 1916 (6 & 7 Geo 5, c. 44).

came together, not so much because the people wanted to take part in public affairs, as because the King wanted money and information; and the theory that Parliament owed its existence to the King's writ was true to this extent, that the writ was the recognized means by which the three estates could be brought together.

Duration of Parliament unaffected.

The inconvenience was met by a series of statutes. 7 & 8 Will. III, c. 15, enacted that Parliament should last for six months after the demise of the Crown, if not sooner dissolved by the new sovereign. This rule was made applicable after the Acts of Union with Scotland and with Ireland to Parliaments of Great Britain, and of the United Kingdom. The Representation of the People Act, 1867, makes the *duration* of a Parliament independent of the demise of the Crown[1].

30 & 31 Vict. c. 102, s. 51.

Demise during dissolution,

But a demise of the Crown may occur subsequent to a dissolution, but before the day appointed for the meeting of Parliament. In such a case, by 37 Geo. III, c. 127, s. 4, the old Parliament is to convene and sit for six months, unless sooner prorogued or dissolved by the new sovereign. If the demise took place on or after the day named in the writs of summons for assembling the new Parliament, then the new Parliament was to meet under similar conditions. In this last case the Act of 1867 removes the limit of six months to the existence of the new Parliament.

prorogation, or adjournment.

Lastly, a demise of the Crown may take place when a Parliament is in being, but is prorogued or adjourned. In such a case by 6 Anne, c. 41, s. 5, Parliament is to meet at once and without summons.

Occasion might arise when 37 Geo. III, c. 127 would be of use in filling a gap left by the Act of 1867, which does not provide for the interval between a dissolution and the meeting of the new Parliament. But this curious result

[1] The Act of 1867 deals only with the Representation of the People in England and Wales. But s. 51 provides that 'a Parliament in being shall not be dissolved or determined by a demise of the Crown' and is of a general character. There can be no partial dissolution of Parliament, and the provision extends to the Scotch and Irish constituencies. See the answer given by Sir R. Finlay to a question on this subject on February 19, 1901. 189 Hansard, 4th ser., p. 484.

might follow—that at the close of a general election which has effected a complete change in the balance of parties, the old House of Commons, largely composed of lately rejected candidates, would resume its place and keep it until a fresh dissolution. Even now there is no provision for the remote possibility that a King might die after a dissolution and before the writs were issued.

Inconveniences of the theory.

The inconveniences to which the doctrine while it prevailed might give rise may best be illustrated in the case of the flight of James II, when the country was left without a King, and with no means of satisfying the legal requirements of form for summoning a Parliament.

The Prince of Orange summoned the peers, such members of the last three Parliaments of Charles II as happened to be in London, and some citizens; by their advice he issued letters, not in the form of writs, but of the same purport, addressed to the Lords Spiritual and Temporal, being Protestants, to the Coroners, or in their default to the Clerks of the Peace of the counties, to the Vice-Chancellors of the Universities, and the chief Magistrates of the towns, summoning a Convention. When at the request of this Convention William and Mary had accepted the crown and all the elements of a legislature were present, a Bill was passed which turned the Convention into a Parliament. It was dissolved at the end of the year, and its acts were declared to be valid by the next Parliament.

It is interesting to consider how much of all the procedure which has been just described is law, and how much is custom. Under the term 'law' will be included not only statute law, but that which is sometimes called the law of Parliament, a set of rules which are really part of the common law; and under the term 'custom' those conventions a departure from which would not affect the validity of any parliamentary proceedings or touch any public or private right.

How much of this chapter is

Statute law determines the number and indicates the mode of election of the representative peers of Scotland and Ireland, and it determines the number of the spiritual

Statute Law: peers and the number and status of the Lords of Appeal. It provides a form of writ to be addressed to the returning officers of counties and towns. It fixes the form of oath to be taken or declaration made, and the penalty for non-observance of this rule. It determines the duration of Parliament subject to the prerogative right of the Crown to dissolve, and it has abolished the common law rule as to the effect of the demise of the Crown upon the existence of Parliament.

how much is Common Law: Common law governs all that relates to the prerogative of the Crown; its right to summon Parliament and to summon it in the form of proclamation; to open, prorogue, and dissolve it, and to do it so either in person or by Commission[1].

The whole of the rights of the Peerage, except in so far as they are touched by Statute, are matter of Common Law, and these include the right of summons, and of summons in a certain form.

The existence of the privileges of the House of Commons (for we are not here concerned with their nature and extent) is also a part of the law of the land, although the form is used of asking and receiving them by favour of the Crown.

how much is Custom. From these rules, by which rights and liabilities public and private may be affected, we must distinguish conventions and formalities which are legally immaterial. The mode of electing a Speaker could be altered at pleasure by the House of Commons; the approval of the Speaker-elect by the King is not seemingly a legal necessity[2]; the claim of privilege made by the Speaker might probably

[1] The statutory and the practical limits to the right and power of the Crown to conduct the business of the country without a Parliament will come to be dealt with later. The statutory limits are too wide to be worth mentioning here, and the practical limits too narrow to be easily explained till the process of legislation in respect of the appropriation of supply has been set out.

[2] Sir E. May cites three cases of Speakers who acted as such without the royal approval; they occurred in the Convention Parliament which restored Charles II, in that which elected William III and Mary, and on one occasion during the insanity of George III in 1789. May, Parliamentary Practice (ed. 12), 148.

be omitted without affecting the recognition of parliamentary privilege by the Courts of law. The speech from the Throne setting forth the causes of summons may be necessary to put in motion the business of the Houses, but the addresses in answer are non-essential forms: for Parliament is not limited in legislation or discussion by the topics set forth from the throne, and each House is at pains to show its independence of those topics by reading a Bill for the first time before entering upon the consideration of the King's speech. The procedure of either House is matter for its own consideration, though incidentally the effect of changes in the order of business and the rules of debate may be of far-reaching importance.

CHAPTER IV

THE HOUSE OF COMMONS

We have dealt so far with the mode in which a Parliament is brought into existence, its business set in motion, its session terminated by a prorogation, or its existence by a dissolution. We come now to deal in detail with the three constituent elements of Parliament, the Crown, the Lords, and the Commons. It is convenient to take these in reverse order. The Commons, though not the most ancient, are the most important part of the Legislature, and involve more points for consideration, for we must treat not only of the qualifications of members, but of the qualifications of those who elect them, and of the form and manner of a Parliamentary election, as well as of the privileges of the House and of its members.

We have then here four topics: (1) who may be chosen for the House of Commons; (2) who may choose; (3) how they may choose; (4) what are the special privileges possessed by the House of Commons collectively, or by its members individually.

Section I

Who may be chosen

Disqualifications for House of Commons.

First, then, we must consider who may be chosen to serve in the House of Commons, or rather who are disqualified for membership by some incapacity, whether inherent, as in the case of an infant or lunatic, or acquired by profession or office, or incurred by felony, bankruptcy, or corruption.

Infancy.

§. 1. Infants are disqualified by the law of Parliament according to Sir Edward Coke, but the rule was not unfrequently broken[1] until the disqualification was made

[1] 'Many under the age of 21 years sit here by connivency, but if questioned would be put out'; 1 Com. Journ. 681; and see Hatsell, ii. 6.

statutory by 7 & 8 Will. III, c. 25, s. 8. It was applied to the Scotch members by the Act of Union with Scotland, and to members returned for Irish constituencies by 4 Geo. IV, c. 55, s. 74.

There have been cases since the passing of 7 & 8 Will. III, c. 25, in which a minor has been elected and has taken his seat without objection. Charles James Fox was returned, took his seat, and spoke while yet under age[1], and Lord John Russell was returned a month before attaining his majority[2]. But there are no instances of such an infringement of the law since the passing of the Reform Bill of 1832.

Unsoundness of mind.

§ 2. Lunacy or idiocy is a disqualification at Common Law, and, under certain conditions, by Statute[3].

The history of the law on this subject may be collected from the report[4] of a Committee appointed to inquire into the case of Mr. Alcock in 1811.

Cases were not unusual, in times when a seat in the Commons was not so much an object of ambition as it now is, of members asking the House to relieve them from their duties on the ground of sickness or other infirmity. A further reason for such requests in the case of ill-health would seem to be that office was not a disqualification before the beginning of the eighteenth century; consequently a member could not vacate his seat by accepting the stewardship of the Chiltern Hundreds or other nominal office under the Crown[5]. But the House would not declare a seat vacant on such grounds, unless it was satisfied that the malady was incurable, nor would it interfere in more recent times except in such a malady as insanity, which

Insanity.

[1] Russell, Life and Times of C. J. Fox, i. 10.

[2] Walpole, Life of Lord John Russell, i. 70.

[3] Lunacy (Vacating of Seats) Act, 1886 (49 Vict. c. 16).

[4] 66 Com. Journ. 687.

[5] In 1604 the borough of Dorchester petitioned that one of its members, Matthew Chubbe, might be relieved from his duties on the ground of bodily infirmity. The burgesses acknowledge that Mr. Chubbe did at the time of his election 'intreat us that he might be spared therein, offeringe to some other to be chosen five pounds towards his charges to serve therein.' They beg that 'he may not seem contemptuous by his absence, that it will please you to dismisse the saide Chubbe and to graunt a writ for the election of another'. It does not appear that this petition was granted. Oldfield, Representative Hist. of Great Britain, iii. 346.

would make the request and acceptance of the Chiltern Hundreds impossible.

In the case of Mr. Alcock[1] his constituents petitioned the House complaining that the insanity of their member deprived them of his services. He had been found a lunatic upon commission, and was in confinement. A committee was appointed, which, after taking evidence and searching for precedents, reported that his case was not so hopeless of cure as to justify the House in declaring the seat vacant.

In the more recent case of Mr. Stewart, attention was called, as a matter of privilege, to the fact that he had attended the House and voted in a division while under medical treatment for insanity as a certified lunatic. A motion for a committee to inquire into the circumstances of the case was negatived[2].

The disqualification of a member on the ground of insanity might thus have been brought before the House in one of two ways: by petition from the constituency which is deprived of the services of its member, if the member is in confinement: or by a question of privilege being raised if a person certified to be of unsound mind should take part in the business of the House.

But a third and more effectual way of dealing with the matter is provided by the Lunacy (Vacating of Seats) Act, 1886[3]. Any authority concerned in the committal or reception of a member into any house or place as a lunatic must certify the same, as soon as may be, to the Speaker. The Speaker must obtain a report from specified authorities in lunacy, at once, and again after an interval of six months. If then the member is still of unsound mind the two reports must be laid on the table of the House, and the seat is then vacated.

Aliens.

§ 3. Aliens are incapable of sitting in Parliament both by common law and by statute.

Previous to the year 1700 an alien could acquire capacity for election by becoming naturalized; but the Act of Settlement[4] disqualified all persons born out of the king's

[1] 66 Com. Journ. 226.
[2] 162 Hansard, 3rd ser., 1941.
[3] 49 & 50 Vict. c. 16.
[4] 12 & 13 Will. 3, c. 2, s. 3; see *R.* v. *Cassel and Speyer* [1916] 1 K.B. 595; 2 K.B. 858.

dominions, even though naturalized or made denizens, unless they had been born of English parents. The British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. V., c. 17), which now forms a statutory code upon the subject, excepts political capacity from the general concession which it makes to aliens of equal rights with natural-born British subjects. But the same Act (s. 3 (1)) enables an alien to acquire by naturalization the political rights and obligations of a British subject, and thus to qualify for Parliament.

Peers.

§ 4. A peerage is a disqualification [1]. An English peer may not sit in the House of Commons, nor may a Scotch peer, although he be not one of the representative peers of Scotland.

But an Irish peer may sit for any county or borough of Great Britain so long as he is not one of the twenty-eight representatives of the Irish peerage in the House of Lords [2].

The sons of English peers have been eligible since an order made by the House on the 21st January, 1549, but the eldest sons of Scotch peers, not having been eligible to the Scotch Parliament, were held to be ineligible to the Parliament of Great Britain [3]. Their disability was removed by the Scotch Reform Bill of 1832 (2 & 3 Will.IV, c. 65), s. 37.

Clergy.

§ 5. Clergy of the Established Church and ministers of the Church of Scotland were disqualified in 1801 [4], and clergy of the Roman Catholic Church in 1829 [5]. Clergy of the Church in Wales are, since the Welsh Church Act, 1914, no longer disqualified [6].

[1] It has been contended that a peer of the United Kingdom is not disqualified as such, and that until he has received a writ of summons as a Lord of Parliament he may sit in the House of Commons. In 1895 this point was raised by Lord Wolmer, member for West Edinburgh, on succeeding to the Earldom of Selborne; but the House, upon receiving a report from a Select Committee that Lord Wolmer had succeeded to a peerage of the United Kingdom, at once directed that a new writ should be issued. 33 Hansard, 4th ser., 1058, 1728. A Select Committee, appointed in 1894 to inquire into the vacating of seats, reported that the House usually waited for proof of succession to a peerage by one of its members, such proof being furnished by the issue of the writ, but that if there was any delay in applying for the writ the House could ascertain the fact and act on such evidence as it thought sufficient. Commons' Papers, 1895 (272).

[2] Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 4.

[3] Hatsell, ii. 12.

[4] House of Commons (Clergy Disqualification) Act, 1801 (41 Geo. 3, c. 63).

[5] Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 9.

[6] Welsh Church Act, 1914 (4 & 5 Geo. 5, c. 91), s. 2 (4).

Until 1801 the capacity of the clergy to be elected to Parliament was a matter of doubt. In that year the question was raised by the election of the Rev. J. Horne Tooke for the borough of Old Sarum. On inquiry it seemed that the authorities were not clear[1]: in 1785 a committee of the House had decided in favour of the eligibility of a person in deacon's orders, and elections already made were therefore excepted from the operation of the Act, and Mr. Horne Tooke was allowed to retain his seat.

Unless divested of orders.

The Clerical Disabilities Act, 1870[2], makes it possible for the clergy of the Church of England, whether priests or deacons, to divest themselves of their orders, and thereby to free themselves from this disqualification.

Women.

§ 6. Women are no longer disqualified since the passing of the Parliament (Qualification of Women) Act, 1918[3], and on the 1st December 1919 the first woman member took her seat in the House of Commons[4].

Office:

§ 7. Office of various kinds is a disqualification at common law or by statute.

(a) at Common law, Sheriffs,

Sheriffs appear to have been excluded generally by the terms of the old form of writ, which directs that 'neither you nor any other sheriff of our said kingdom be in anywise elected.' But the restriction was in practice confined to the county for which the sheriff held office, so that the sheriff of Hampshire was held eligible to sit for the borough of Southampton, which was a county of itself[5]; it was extended by a resolution of the House, passed in the case of the borough of Thetford[6], so as to exclude any officer of a borough to whom the writ or precept might be directed.

The disqualification of the sheriff was narrowed by the Parliamentary Elections Act, 1853[7], by which writs for cities and boroughs are no longer addressed to the sheriff of the county in which they are situated, but directly to their returning officers; one may now say shortly that

[1] 35 Parl. Hist. 1349.
[2] 33 & 34 Vict. c. 91.
[3] 8 & 9 Geo. 5, c. 47.
[4] Viscountess Astor, elected one of members for Plymouth at a by-election caused by her husband's succession to the peerage.
[5] 4 Douglas, 87.
[6] 9 Com. Journ. 725.
[7] 16 & 17 Vict. c. 68, s. 1.

no returning officer may sit for the place where he is bidden to cause an election to be made, except where his duties are performed by an acting returning officer, as we shall see may be the case under the Representation of the People Act, 1918 [1].

Judges;

The Judges of the three Common Law courts were declared to be disqualified by a resolution of the House in 1605, they being 'attendants as Judges in the Upper House.' The provisions of the Judicature Act, 1875 [2], have taken the place of this rule.

(b) by Statute.

The history of the statutory disqualifications is voluminous and intricate. They begin soon after the Revolution, when the strength and irresponsibility of the House of Commons made the Crown as anxious to obtain some influence over its members as the House was to exclude persons who held office at pleasure of the Crown.

Commissioners of Stamps and of Excise were excluded by Acts of 1694 and 1699, and in 1700 came the sweeping provision in the Act of Settlement that 'no person who has an office or a place of profit under the King shall be capable of serving as a member of the House of Commons.'

Fortunately this clause in the Act of Settlement was repealed, before it could take effect, by 4 Anne, c. 8, s. 28. Two years later was passed the statute which forms the groundwork of the present law upon the subject.

The Act of Anne.

New office.

6 Anne, c. 7 (41 in revised statutes), s. 24, enacts firstly that no one shall be capable of being elected who has accepted from the Crown any *new* office created since the 25th October, 1705; secondly, that the holders of certain specified offices are incapable of election; and thirdly, it extends the incapacity to persons having pensions from the Crown during pleasure.

Old office.

S. 25 enacts that the acceptance of any office of profit under the Crown by a member of the House of Commons shall avoid his election, but that he may be re-elected. This section must be construed to refer to *old* offices, otherwise it would repeal a part of s. 24.

[1] 8 & 9 Geo. 5, c. 64, s. 30; *post*, p. 142.
[2] 38 & 39 Vict. c. 77, s. 5.

Commissions in army and navy.

S. 27 excepts from the operation of the statute commissions in the army and navy.

Since the Act of Anne many statutes have been passed subjecting old or new offices to the total disqualification of s. 24, or the partial disqualification of s. 25. An attempt has been made to summarize the disqualifying statutes in an Appendix to this chapter, but in this place a general statement of the law will be sufficient.

It is of some importance to know what constitutes acceptance; and we may regard it as now settled that acceptance of office takes place, so as to vacate a seat, when overt expression is given of the intention to accept an offer made by the proper authority[1]. But office held under the Crown does not always disqualify the holder for a seat in the House, and we may divide offices into groups, having regard to the extent or the existence of the disqualification.

(*a*) Offices which disqualify.

(*a*) The first group comprises those offices the acceptance of which is wholly incompatible with a seat in the House of Commons.

New offices under s. 24.

Such are *new* offices *under* the Crown within the meaning of the Act of Anne. Among these we must include all offices under the Crown created since 1705, unless they are specially exempted by the statute which creates them. In the case of many new offices the disqualification has been expressly stated in the statute creating the office. A paid Charity Commissionership or a place on the Council of India would afford an instance of such offices.

Old offices under subsequent statutes.

Such are also certain *old* offices which fall under the 25th section, and which by subsequent statutes have been

[1] In 1864 Mr. Bruce accepted the office of President of the Committee of Council for Education, and it was questioned whether his seat was thereby vacated, as he had not then been sworn of the Privy Council. His acceptance was held to vacate the seat, and a new writ issued. The matter was important because Mr. Bruce was at that time an Under-Secretary of State, and by an oversight there were five Under-Secretaries in the House at the same time. The Act 27 & 28 Vict. c. 34 had not then been passed, so that the Under-Secretaries' seats were not affected by this incident, only they were under heavy penalties for sitting and voting. Diary of Mr. Speaker Denison, 155; 174 Hansard, 3rd ser., p. 1237; Report of Committee on Vacating Seats, H. of C. 1894 (278), p. 80.

made to carry with them a total instead of a partial disqualification. Instances of such an office are afforded by the Mastership of the Rolls, or the offices about Court abolished in Burke's measure of economical reform with a provision that, if revived, they were to be regarded as *new* offices [1].

The sixth Under-Secretary of State.

A disability is created in the case of Secretaries and Under-Secretaries of State. S. 4 of the Government of India Act, 1858 [2], provides that not more than four Secretaries and four Under-Secretaries may sit at the same time in the House of Commons; and by a later Act the election of any one who accepts the office of Under-Secretary in violation of this rule is void, and he (and also any Secretary or Under-Secretary who is not a member) is incapable of being elected so long as he holds his office and there are four Secretaries or Under-Secretaries, as the case may be, sitting in the House. If more than four Secretaries or Under-Secretaries of State are returned at a general election, no one of these can sit and vote until by resignation of office or otherwise the number is reduced to four [3].

The creation of a new Secretaryship of State in 1917 [4] made an amendment of these provisions necessary, and 'five' was accordingly substituted for 'four' in both the Acts above mentioned [5].

(*b*) Offices which necessitate re-election.

(*b*) The second group comprises those offices, the acceptance of which vacates a seat, but leaves the holder eligible for re-election.

Such are all *old* offices, that is, offices in existence before 25 October, 1705, except those which have been made an absolute disqualification by subsequent statutes. Such also are the offices created by statutes subsequent to

[1] 22 Geo. 3, c. 82.

[2] 21 & 22 Vict. c. 106; repealed with the exception of s. 4 by the Government of India Act, 1915 (5 & 6 Geo. 5, c. 61).

[3] House of Commons (Vacation of Seats) Act, 1864 (27 & 28 Vict. c. 34).

[4] Air Force (Constitution) Act, 1917 (7 & 8 Geo. 5, c. 51), s. 11.

[5] The New Ministries and Secretaries Act, 1916 (6 & 7 Geo. 5, c. 68) suspended during the continuance of the war and six months thereafter all limitations on the number of Under-Secretaries of State or of Secretaries of any Government Department who may sit and vote in the House of Commons.

6 Anne, c. 7, which cause the seat to be vacated but expressly leave the holder eligible for re-election. Examples may be found in the cases of the President of the Board of Education and the Minister of Agriculture.

The holders of certain of these offices, set out in Sched. H of the Representation of the People Act, 1867 [1], if transferred from one office to another in the same Schedule, are not required to offer themselves for re-election on the transfer. The Schedule has from time to time been extended to include other offices [2].

Re-election of Ministers Act, 1919.

The vacating of his seat by a newly-appointed Minister, followed as it often is by a contested by-election which necessitates his presence in his constituency instead of in his department, has often caused a serious hindrance to public business, especially when a new Ministry comes into office after a general election; but attempts to alter the law have been jealously regarded by the House of Commons on the ground that the electorate ought not to be deprived of the opportunity which such occasions afford of giving expression to their views on the general policy of the Government. But in 1919 an Act was passed [3] which provides that acceptance of an office within nine months after the issue of a Proclamation summoning a new Parliament shall not compel the holder to submit himself for re-election, and the rigour of the old rule is thereby substantially mitigated. The nine months' limitation did not in fact appear in the Bill as introduced, but an amendment to insert it was accepted by the Government after receiving support from all parts of the House [4]. The Act does not affect the statutory

[1] 30 & 31 Vict. c. 102. There are corresponding Acts for Scotland (31 & 32 Vict. c. 48, Sched. H) and Ireland (31 & 32 Vict. c. 49, Sched. E).

[2] E. g. Secretary for Scotland (48 & 49 Vict. c. 61); President of Board of Education (62 & 63 Vict. c. 33); Minister of Agriculture (52 & 53 Vict. c. 30). The Schedule only applies where one office is accepted *in succession to* another; thus, when Mr. Asquith in July 1914 became Secretary for War as well as First Lord of the Treasury he vacated his seat and was subsequently re-elected.

[3] Re-election of Ministers Act, 1919 (9 Geo. 5, c. 2). An Act of 1916 (6 & 7 Geo. 5, c. 56) had previously been passed to meet the special case of Ministers who had been appointed to new offices in December 1915 and January 1916.

[4] 112 Parl. Deb. 5th ser. 646-50, 795, 1309.

number of Secretaries of State and Under-Secretaries who may sit in the House of Commons, nor does it apply to the office of Steward of the Chiltern Hundreds or of the Manor of Northstead [1].

(c) Offices which do not disqualify.

(*c*) There are certain offices the acceptance of which, though they are concerned with the administration of departments of State, does not disqualify from sitting or necessitate re-election.

An Act of 1741 [2], which added largely to the disqualifications created by the Act of Anne, expressly exempted the Secretaries of the Treasury, of the Chancellor of the Exchequer and of the Admiralty, the Under-Secretaries of the principal Secretaries of State, the Treasurer of the Navy, the Deputy Paymaster of the Army, and any persons holding office for life or during good behaviour.

This group has been extended from time to time with the increase in the number of the Principal Secretaries of State, and with the creation of Boards with a Parliamentary Secretary, appointed by the Board, and qualified for a seat in the House. Other offices, such as commissions in the militia [3] or in the reserve forces [4], are exempted from disqualifications by statute. The office of Minister without portfolio (that is, a Privy Councillor appointed a Minister of the Crown at a salary, without any other office being assigned to him) and that of Secretary for Mines are the most recent additions to the list. But not more than three Ministers without portfolio may sit in the House of Commons at the same time [5].

Effects of disqualification.

The effects of disqualification vary. In some cases the election is simply avoided. In others a heavy penalty is imposed in addition if the office-holder has sat and voted. The law upon the subject is extremely intricate and perplexing; it might well be reduced into the compass of a single statute, for the principles involved are very simple,

[1] As to these offices, see *post*, pp. 99–100.

[2] House of Commons Disqualification Act, 1741 (15 Geo. 2, c. 22).

[3] Militia Act, 1882 (45 & 46 Vict. c. 49), s. 38.

[4] Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 36.

[5] Re-election of Ministers Act, 1919 (9 Geo. 5, c. 2), s. 2; Mining Industry Act, 1920 (10 & 11 Geo. 5, c. 50), s. 6.

and this simplicity would not be lost if, with the cases to which they are applicable, they were crystallized in a code.

Its practical objects

It may be noted that the original ground for the disqualification of permanent officials is no longer the actual ground. It is not for fear of royal influence that Charity Commissioners or the permanent staff of the various departments of government are rendered incapable of sitting in the House of Commons. The need of securing the best men for the public service apart from political considerations, the converse need of a harmony between the head of a department and his subordinates, which could not exist if they were habitually opposed in debate, are now the acknowledged reasons for the exclusion of the various officials who are enumerated in the Appendix to this Chapter. But these reasons, which make it desirable to exclude permanent members of the Civil Service from the House of Commons, do not apply to s. 25 of the Act of Anne, which requires the re-election of the Parliamentary heads of departments on their acceptance of office. For the reasons already explained, however, Parliament has shown itself unwilling to abolish this rule, though recent legislation has done much to mitigate its effects by restricting its operation to the case of acceptance of office after the expiration of nine months from the summoning of a new Parliament.

Pensions.

§ 8. Persons who hold pensions at the pleasure of the Crown are disqualified by 6 Anne, c. 7 [41], s. 24. This disqualification was extended by 1 Geo. I, st. 2, c. 56, to pensioners of the Crown for terms of years whether held in the name of the pensioner or by another in trust for him ; and the word ' pension ' is construed by 22 Geo. III, c. 82, s. 30, to mean a grant of royal bounty repeated more than once in three years. The disqualification is removed in the case of civil service and diplomatic pensions by Acts of the last reign [1].

Government contracts.

§ 9. A person who directly or indirectly, himself or through the intervention of a trustee, holds or undertakes any contract or commission, for or on account of the public service, is incapable of being elected : if elected, the election

[1] 32 & 33 Vict. cc. 15 and 43.

is void, and there is a penalty of £500 imposed for every day in which a person labouring under such a disability shall sit and vote. This disqualification is created by the House of Commons (Disqualification) Acts, 1782 and 1801 [1].

The 'public service' to which the Acts refer is not confined to the public service of the United Kingdom, nor need it be paid for out of moneys voted by Parliament; it means the service of the Crown anywhere [2]. The Acts would appear to apply to contributions or subscriptions to Government loans. A Select Committee in 1855 were of opinion that they did not; but in the various Finance Acts passed during the late war it was thought necessary that such contributions and subscriptions should be specially excepted [3].

Convicted felons.

§ 10. A person attainted or adjudged guilty of treason or felony who has not received a pardon, or served his term of punishment, is incapable of election.

Mitchel's case.

The common law on this subject is most clearly laid down in the case of John Mitchel, who, having been sentenced to transportation after conviction of treason-felony, escaped before his sentence had expired, and was subsequently elected for Tipperary. The House of Commons declared the seat vacant, there being no petition against his election. A new writ was issued, Mitchel stood again, was elected, and upon a petition being lodged against his return, the Court held that votes given to him were thrown away, and that his opponent who claimed the seat was entitled to it [4].

The ground on which the disqualification would seem to rest was that, as was argued by Sir John Holker in the debate in the House of Commons on the case of John Mitchel, a person convicted of treason or felony was not 'a fit and proper person' within the meaning of the old form of writ addressed to the Sheriff [5]. But it had always

[1] 22 Geo. 3, c. 45; 41 Geo. 3, c. 52.

[2] Judgment of the Privy Council in *Sir S. Samuel's Case* [1915], A. C. 514.

[3] By reason doubtless of the Privy Council's decision, *supra*; cf. Finance Act, 1914 (sess. 2), s. 14 (2); War Loan Act, 1915, s. 1 (2); Finance Act, 1915, s. 26; and others; and see 110 Com. Journ. 325; Report, 1855 (401).

[4] 9 I. R. C. L. 217.

[5] Speech of Sir John Holker (Solicitor-General), 222 Hansard, 3rd ser., 511.

been held that one so convicted, if he had served his term of punishment or received a pardon in due form, was eligible, subject to some doubt as to the effect of a resolution of the House of Commons declaring him still to be ineligible.

All doubts on the subject are set at rest by the Forfeiture Act, 1870[1], s. 2, providing that any person 'hereafter convicted of treason or felony, for which he shall be sentenced to death, penal servitude, or any term of imprisonment with hard labour, or exceeding twelve months, shall become and (until he shall have suffered the punishment to which he shall be sentenced, or such other punishment as may by competent authority be substituted for the same, or shall receive a free pardon from Her Majesty) shall continue thenceforth incapable of being elected, or sitting, or voting as a member of either House of Parliament.'

A member convicted of misdemeanour, or sentenced to a shorter term of imprisonment, without hard labour, than twelve months, is not thereby disqualified. It rests with the House to deal with such cases, if necessary by expulsion, though expulsion does not disqualify or prevent the constituency from re-electing the expelled member.

Bankruptcy.

§ 11. A bankrupt[2] is disqualified for election, or, if elected, for sitting and voting. Unless the disqualification is removed by annulment of the adjudication in bankruptcy, or by a grant of discharge, accompanied by a certificate that the bankruptcy was not caused by misconduct, the seat will fall vacant in six months from the date of adjudication.

Corrupt practices at a Parliamentary election.

§ 12. A candidate who is found at the trial of an election petition to have been guilty of corrupt practices within the meaning of the Corrupt and Illegal Practices Act, 1883[3], or on whose behalf and with whose knowledge such practices

[1] 33 & 34 Vict. c. 23.

[2] Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 32, 33 and Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 9. These sections are not touched by the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59) which repealed the greater part of the existing statutes and re-enacted them (with amendments) in a consolidated form. The law in Ireland is slightly different: *post*, p. 199 (*note*)

[3] 46 & 47 Vict. c. 51. See ss. 4, 5, 6, 11.

have been committed, is disqualified for ever from sitting for the place at which his offence was committed; and for seven years from sitting for any other.

If the corrupt practice was the unauthorized act of an agent, the employer is disqualified for seven years from sitting for the place at which the offence was committed; and a similar penalty follows on proof of illegal practices committed by a candidate, or with his knowledge on his behalf. Illegal practices by an agent disqualify the candidate for that constituency during the Parliament for which the election was held.

Extinct disqualifications. (a) The Parliamentary oaths.

§ 13. There are certain extinct forms of disqualification which still possess an interest for us; and perhaps the most important of these is the requirement to take an oath or oaths as a condition precedent to the right to sit and vote. The history of the subject may be stated as follows.

Oath of Supremacy.

The oath of supremacy was required to be taken before the Lord High Steward, by knights and burgesses, in the fifth year of Elizabeth [1]. One who entered the parliament-house without having taken the oath was to suffer such pains and penalties as if he had presumed to sit in the House 'without election, return, or authority'.

Of allegiance.

The oath of allegiance was required to be taken by the same persons, and in the same manner, before they 'shall be permitted to enter the said house', by 7 Jac. I, c. 6, s. 8. By 30 Car. II, st. 2 these oaths were required to be taken by both Houses, and no longer before the Lord Steward but by the Lords and Commons at the tables of their respective Houses [2].

Declaration against transubstantiation.

To these was added a declaration against transubstantiation, maintained as a condition precedent to the right to sit and vote until the Roman Catholic Relief Act of 1829.

The penalties for 'doing anything contrary' to these Acts were very heavy. The offender was liable to a penalty of £500 for each offence, was to be deemed a popish recusant, and was permanently disabled from holding any office civil

[1] 5 Eliz. c. 1. [2] 30 Car. 2, st. 2, c. 1.

or military, from sitting in either House of Parliament, prosecuting a suit in any court, or taking a legacy.

Oath of abjuration.

The forms of the oaths were altered and shortened, but the declaration and the penalties were retained after the Revolution, by 1 Will. & Mary, c. 1, and in 13 Will. III, c. 6, an additional oath was required, the oath of abjuration.

The requirement of these oaths was confirmed, with the penalties, by 1 Geo. I, st. 2, c. 13, and thus the law remained, with some exemptions in favour of Quakers, until 1829.

Purport of the oaths.

The oath of allegiance was a declaration of fidelity to the reigning sovereign: the oath of supremacy was a repudiation of the spiritual or ecclesiastical authority of any foreign prince, person, or prelate, and of the doctrine that princes deposed or excommunicated by the Pope might be murdered by their subjects: the oath of abjuration was a repudiation of the right and title of the descendants of James II to the throne. To these must be added the declaration against transubstantiation.

This declaration, and the oath of supremacy, stood in the way of the Roman Catholics, while the oath of abjuration, which concluded with the words '*on the true faith of a Christian*', could not be taken by a Jew.

The tremendous penalties imposed by the Act of Charles II were not directly taken away until 1866 by an Act [1] which left only the liability to pay £500 for every occasion on which a member sat and voted without taking the oath. In the reign of William III a refusal to take the oaths seems to have led to no worse consequences than a declaration by the House of Commons that the seat was vacant [2].

Roman Catholics.

The Roman Catholic Relief Act, 1829 [3], provided a single form of oath, acceptable to Roman Catholics and available to them only: it further abolished, in all cases, the necessity for the declaration against transubstantiation.

Jews.

The Jews were still excluded by the concluding words of the oath of abjuration. These were held to be an integral

[1] 29 Vict. c. 19.

[2] Cases of Sir Henry Mounson and Lord Fanshaw: 10 Commons' Journals, 131; 5 Parl. Hist. 254.

[3] 10 Geo. 4, c. 7.

part of the oath[1], and thus, though the seat was not vacated, a Jew could not vote except under a ruinous penalty.

But in 1858 an Act[2] was passed enabling either House to dispense with the use of the words 'on the true faith of a Christian' by resolution in individual cases: and in 1860 another Act[3] gave power to either House to make a standing order to the same effect. Meantime in 1858 a single form of oath had been prescribed instead of the three oaths of allegiance, supremacy, and abjuration, and finally in 1866 the words which caused the difficulty were omitted from the statutory form required[4].

Henceforth difficulty arose only in the case of persons who objected on religious grounds to any form of oath, or of persons who having no religious belief objected to an oath as having no meaning for them.

Quakers, &c.

The first was the case of Quakers, Moravians, and others to whom it was objectionable to take an oath. These were exempted expressly by various statutes, and were permitted to make affirmation in terms prescribed[5].

Atheists.

The second case gave rise to the mass of litigation to which the late Mr. Bradlaugh was a party.

The case of Mr. Bradlaugh.

Mr. Bradlaugh, at the meeting of Parliament in 1880, demanded to be allowed to affirm instead of taking the oath, alleging that he, having no religious belief, was 'a person for the time being permitted by law to make a solemn affirmation or declaration instead of taking an oath.'

The House allowed him to make affirmation, and he was sued by an informer for the penalties due from him as having sat and voted without taking the oath.

The Court of Appeal, affirming the judgment of the Queen's Bench Division[6], held that Mr. Bradlaugh was not exempt from the liability to take the oath. The fact that under the Evidence Acts of 1869 and 1870 he would have been enabled to make a promise and declaration to tell the

[1] *Miller* v. *Salomons*, 7 Exch. 475; 8 Exch. 778.
[2] Jews Relief Act, 1858 (21 & 22 Vict. c. 49).
[3] 23 & 24 Vict. c. 63.
[4] Parliamentary Oaths Act, 1866 (29 Vict. c. 19).
[5] Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 11.
[6] *Clarke* v. *Bradlaugh*, 7 Q. B. D. 38.

truth did not bring him into the class of persons indicated in the Parliamentary Oaths Act of 1866, and the Promissory Oaths Act of 1868. These were not persons on whom an oath would have no binding force, but persons who had a conscientious objection to taking an oath.

When the case of *Clarke* v. *Bradlaugh* reached the House of Lords[1] it was there held that the statutory penalty was not recoverable by a common informer; but Mr. Bradlaugh was held not to be entitled to make affirmation in lieu of the oath.

He then endeavoured to take the oath, but the House resolved that he should not be allowed to do so, and the Queen's Bench Division refused to make a declaration to the effect that he was entitled to do so[2].

On the 11th of February, 1884, Mr. Bradlaugh entered the House; came to the table without being called upon by the Speaker; read from a paper in his hand the words of the oath, and having kissed a book which he brought with him, signed the paper and left it on the table. He subsequently voted in a division, and an action was brought against him, this time at the suit of the Crown, for the penalty which he had incurred by so voting.

The Court of Appeal, when the matter came before it[3], held not only that the manner in which Mr. Bradlaugh had taken the oath was insufficient to meet the requirements of the Parliamentary Oaths Act, but that his want of religious belief, if proved to the satisfaction of a jury, made it impossible for him to satisfy the requirements of the Act even if he had taken the oath in due form.

On the 13th of January, 1886, Mr. Bradlaugh took the oath among other members elected to the new Parliament. The Speaker refused to intervene, holding that the resolution of the former House of Commons had lapsed with the dissolution in 1885; that the Speaker had no authority to prevent a member from taking the oath; and that he should not permit (as a former Speaker had permitted) a

[1] *Clarke* v. *Bradlaugh*, 8 App. Ca. 354.
[2] *Bradlaugh* v. *Gossett*, 12 Q. B. D. 271.
[3] *Attorney-General* v. *Bradlaugh*, 14 Q. B. D. 667.

motion to be made restraining a member from taking the oath. 'The honourable member,' he said, 'takes the oath under whatever risks may attach to him in a court of law.'

Mr. Bradlaugh therefore sat and voted subject always to the risk that the law officers of the Crown might proceed against him for penalties incurred and prove to the satisfaction of a jury that having no religious belief he had not taken the oath within the meaning of the Parliamentary Oaths Act.

Affirmation in lieu of oath.

The last stage in the history of this test of the political or religious creed of persons elected to serve in the House was reached when the Oaths Act, 1888,[1] was passed. By this Act it is provided that in all places and for all purposes where an oath is or shall be required by law an affirmation may be made if the person who should be sworn objects to take an oath either on the ground that he has no religious belief or that the taking of an oath is contrary to his religious belief.

The affirmation is made in the following form: 'I, A. B., do solemnly, sincerely and truly declare and affirm,'—the words of the oath required by law are then proceeded with.

Object of disabilities political not religious.

It should be noticed that all the express disabilities created by the form of oath have been imposed for political purposes, and so far as they were directed, as they mainly were directed, at Roman Catholics, their object was to exclude from Parliament persons who were presumed to be disloyal to the reigning sovereign, because they desired to see a Roman Catholic on the throne, or because they recognized, behind the throne, the supreme authority of the Pope.

The words which excluded Jews were not intentionally directed at them; nor would it seem that the question of the quality of religious belief apart from its political significance was ever raised before the case of Mr. Bradlaugh.

Nonconformists were never disqualified as such, except in so far as their religious convictions prevented them from taking any form of oath. The Acts exempting Quakers and others who were in this way of thinking were designed

[1] 51 & 52 Vict. c. 46.

'to put Quakers on a footing with all other dissenters in England.'[1]

(*b*) Residence.

Residence is another of the extinct grounds of disqualification: for residence in their constituencies was required of the knights and burgesses who represented shires and towns by 1 Henry V, c. 1. This requirement had fallen out of use as early as the reign of Queen Elizabeth[2], but the Act of Henry V was not repealed till 1774.

(*c*) Property.

A property qualification was created by 9 Anne, c. 5, consisting of an estate in land which, in the case of a knight of the shire, must be worth £600 a year, in the case of a burgess £300 a year; and this qualification had to be affirmed upon oath, and later by declaration made by the candidate upon the request of two electors, or of a rival candidate, at any time before the day fixed in the writ of summons for the meeting of Parliament.

This Act was modified by some subsequent statutes, but all the provisions relating to the qualification were repealed in 1858[3].

(*d*) Profession of the law.

An Act of 1372 provides that 'no man of the law following business in the King's Court, nor any sheriff for the time that he is a sheriff, be returned nor accepted knight of the shire.' This statute was not repealed until 1871[4], though its provisions had long been forgotten.

Resignation of a seat impossible.

But apart from the disqualifications already described as voiding an election, a member once elected can only cease to represent his constituency by reason of his death, or of the dissolution of Parliament. A seat cannot be resigned, nor can a man who has once taken his seat for one constituency throw it up and contest another. Either a disqualification must be incurred, or the House must declare the seat vacant; and, as we have seen, the House has not shown itself very willing to declare a seat vacant on the ground of physical incapacity, or personal unwillingness to serve.

The use of official disability.

The disability attaching to office is thus of great practical

[1] 15 Hansard, 3rd ser., p. 639.
[2] 1 Parl. Hist. 749.
[3] 21 & 22 Vict. c. 26.
[4] 34 & 35 Vict. c. 116.

convenience. Certain old offices of nominal value in the gift of the Treasury are now granted, as of course[1], to members who wish to resign their seats in order to retire from Parliament or to contest another constituency. Those which survive are the stewardship of the Chiltern Hundreds and of the manor of Northstead. The office is held during pleasure, and merely operates to vacate the seat.

It is curious to note that a good many years elapsed after the passing of the Act of Anne before it was discovered that the acceptance of one of these small offices was a means of vacating a seat which a member desired to resign. The earliest use of a Stewardship of a royal manor for this purpose was in 1740. In that year Sir Watkin Wynn accepted the Stewardship of the king's lordship and manor of Bromhild and Gale in the county of Denbigh in order to vacate his seat for the county. In 1742 the Stewardship of the manor of Otford in Kent was used for the same purpose. In 1751 the Chiltern Hundreds first appears, in 1752 the manor of Berkhamstead. The Chiltern Hundreds and the manor of Northstead now alone remain to supply, in circuitous fashion, the formality which should attend the resignation of his seat by a member of the House of Commons.

Form of warrant of appointment to the Stewardship of the Manor of Northstead[2].

To all to whom these Presents shall come, the Right Honourable Chancellor and Under-Treasurer of His Majesty's Exchequer, sendeth greeting. Know Ye, that I, the said have constituted and appointed, and by

[1] In 1775 Lord North refused the Chilterns to a political opponent, but the Chancellor of the Exchequer does not now make any inquiry into the objects for which the office may be sought, unless an election petition has been instituted or criminal proceedings taken against the member who applies. Since 1880 the words which expressed the confidence of the Crown in the fidelity of the person appointed have been omitted from the warrant. Report (Vacating of Seats), 1894 [278], p. 4. Sir William Harcourt's evidence, given before the Committee, describes the conditions under which these offices are now given. The history of the offices is set out in an Appendix to the Report.

[2] The warrant for the Chilterns is identical *mutatis mutandis*.

these presents do constitute and appoint to be Steward and Bailiff of the Manor of Northstead,

with the returns of all writs, warrants, and executions of the same, (in the room and place of whose constitution to the said offices I do hereby revoke and determine,) together with all wages, fees, allowances, and other privileges and pre-eminences whatsoever to the said offices of Steward and Bailiff belonging, or in any wise appertaining, with full power and authority to hold and keep Courts, and to do all and every other act and acts, thing and things, which to the said offices of Steward and Bailiff of the Manor aforesaid, or either of them, do belong or in any wise appertain, in as full and ample manner as any former Steward or Bailiff of the said Manor hath lawfully had, received, or enjoyed the same, to have and to hold the said offices of Steward and Bailiff of the said Manor, together with all wages, fees, allowances, and other privileges and pre-eminences whatsoever to the said during His Majesty's pleasure; and I do hereby authorize and empower the said to demand and receive for His Majesty's use all Court Rolls and other writings relating to the said Manor from any person or persons having the same in their hands or custody. And all and every such person and persons having the same in their hands or custody are hereby required to deliver up the same to the said provided, nevertheless, that the said shall enter these presents in the office of the proper Auditor within forty days next after the date hereof, and shall yearly return the Court Rolls of the said Manor into the said office of the said Auditor, and account with the said Auditor for all such sum and sums of money as he, the said shall receive for and to His Majesty's use, within forty days next after the feast day of Saint Michael the Archangel, which shall happen in every year, or else these presents and everything herein contained to be void. In Witness whereof, I have hereunto set my hand and seal the day of in the year of the Reign of His Majesty King George the Fifth, and in the year of our Lord One Thousand Nine Hundred and

Downing-street, }

NOTE I

Summary of Principal Statutes Creating Official Disqualifications [1]

i. *Persons concerned with the Administration of Justice.*

1. Judges of the High Court and Court of Appeal in England: Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 5.
2. Registrars or other officers connected with any Court having jurisdiction in Bankruptcy in England: Bankruptcy Act, 1914 (4 & 5 Geo. V, c. 59), s. 120.
3. County Court judges in England: County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 8.
4. Commissioners of Metropolitan Police: Metropolitan Police Act, 1856 (19 & 20 Vict. c. 2), s. 9.
5. Receiver for Metropolitan Police District: Metropolitan Police Act, 1829 (10 Geo. IV, c. 44).
6. Stipendiary magistrates for various towns are disqualified in the Acts which provide for their appointment.
7. A Recorder for his borough in England: Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 163 (6).
8. A Corrupt Practices Commissioner: Election Commissioners Act, 1852 (15 & 16 Vict. c. 57), s. 1.
9. A barrister appointed to try municipal election petitions: Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 92.
10. Judges of Court of Session, justiciary or baron of the Exchequer in Scotland: Parliamentary Elections (Scotland) Act, 1733 (7 Geo. II, c. 16), s. 4.
11. Sheriff or salaried sheriff-substitute in Scotland: Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII, c. 51), s. 21.
12. Judges of the High Court and Court of Appeal in Ireland, including the Chancellor: Judicature Act (Ireland), 1877 (40 & 41 Vict. c. 57), s. 13.
13. Masters in Chancery in Ireland: House of Commons Disqualifications Act, 1821 (1 & 2 Geo. IV,[2] c. 44), s. 1.

[1] The following summary contains only such offices as disqualify absolutely either for certain constituencies or for all. It has not been thought necessary to set out a list of offices which entail a re-election.

[2] This statute disqualifies the judges of the old Common Law and Chancery Courts in Ireland, and by subsequent Acts the judges in the Irish Courts of Admiralty, Probate, and Bankruptcy were also disqualified. These provisions, except in so far as vested interests are concerned, are merged

14. Judge of Landed Estates Court, Ireland: Landed Estates Court (Ireland) Act, 1858 (21 & 22 Vict. c. 72), s. 7.
15. Assistant barristers in Ireland: Civil Bill Courts (Ireland) Act, 1851 (14 & 15 Vict. c. 57), s. 2.
16. Justices and police officers in Dublin: Dublin Police Act, 1836 (6 & 7 Will. IV, c. 29), s. 19.
17. Magistrates and inspectors of constabulary, Ireland, appointed under the provisions of Constabulary (Ireland) Act, 1836 (6 & 7 Will. IV, c. 13), s. 18; Dublin Police Magistrates Act, 1808 (48 Geo. III, c. 140), s. 14.
18. A Recorder for his borough, in Ireland: Municipal Corporations (Ireland) Act, 1840 (3 & 4 Vict. c. 108), s. 166.
19. A member of, or person holding office under, the Irish Land Commission: Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), s. 54.
20. Registrar of deeds, Ireland: Registry of Deeds (Ireland) Act, 1832 (2 & 3 Will. IV, c. 87), s. 36.
21. Chairman or deputy chairman of London Quarter Sessions: Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 42.

ii. *Persons representing the Crown or holding Offices at Court or under the chiefs of the great Departments of State.*

1. Colonial governors and deputy governors: Succession to the Crown Act, 1707 (6 Anne, c. 7 [41]), s. 24.
2. Members of the Council of India: Government of India Act, 1915 (5 & 6 Geo. V, c. 61), s. 4.
3. A number of Court places were abolished in 1782, and it was provided that, if revived, they should be *new* offices within the meaning of the Act of Anne: Civil List and Secret Service Money Act, 1782 (22 Geo. III, c. 82), ss. 1, 2.
4. Deputies or clerks in the departments of the Treasury, Exchequer, Admiralty, of the principal Secretaries of State, and a number of other Government offices: House of Commons Disqualification Act, 1741 (15 Geo. II, c. 22); House of Commons (Disqualifications) Act, 1801 (41 Geo. III, c. 52), s. 4.
5. Sixth Under-Secretary of State while there are five in the

in the general disqualifying clause of the Irish Judicature Act, 1877, 40 & 41 Vict. c. 57.

House: Government of India Act, 1858 (21 & 22 Vict, c. 106), s. 4; House of Commons (Vacation of Seats) Act, 1864 (27 & 28 Vict. c. 34); Air Force (Constitution) Act, 1917 (7 & 8 Geo. V, c. 51).

6. Commissioners of Public Works, Ireland: Public Works (Ireland) Act, 1831 (1 & 2 Will. IV, c. 33), s. 11.

iii. *Persons concerned with the Collection of Revenue, or Audit of Public Accounts.*

1. Farmers, collectors, and managers of money duties, or other aid. (5 Will. & Mary, c. 7, s. 59.)
2. Farmers, managers, and collectors of customs. (12 & 13 Will. III, c. 10, ss. 87, 88.)
3. Commissioners and officers of excise in England and Ireland: Excise Management Act, 1827 (7 & 8 Geo. IV, c. 53), s. 8.
4. Auditor of the Civil List: Civil List Audit Act, 1816 (56 Geo. III, c. 46), s. 8.
5. Comptroller and Auditor-General, and assistant: Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39), s. 3.
6. Collector-General of rates for Dublin, or any officer or servant in his employment for purposes of the Act. (12 & 13 Vict. c. 91), s. 24.

iv. *Persons concerned with the Administration of Property for Public Objects.*

1. The Commissioners of Woods and Forests[1]: Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 10.
2. The Charity Commissioners (paid), their secretary and inspectors: Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137, s. 5.
3. The Irish Church Temporalities Commissioners: Irish Church Act, 1869 (32 & 33 Vict. c. 42), s. 9.
4. Welsh Church Commissioners and their officers: Welsh Church Act, 1914 (4 & 5 Geo. V, c. 91), s. 10 (8).
5. The Land Commissioners. (4 & 5 Vict. c. 35), s. 5. [The Land Commissioners, who represented in respect of duties and of disabilities the Tithe, Enclosure and Copyhold Commissioners (45 & 46 Vict. c. 38, s. 48), are now made

[1] By the Crown Lands Act, 1906 (6 Edw. 7, c. 28), s. 1, the President of the Board of Agriculture (now the Minister of Agriculture) was made a Commissioner *virtute officii*, with a saving for his right to sit in Parliament.

a part of the permanent staff of the Ministry of Agriculture to which their duties are transferred.]

6. Paid officers of a County Council, in England : Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83 ; and in Ireland : Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), s. 83.

v. *Miscellaneous disqualifying enactments.*

The Succession to the Crown Act, 1707 (6 Anne, c. 7 [41]), s. 24, includes commissioners or subcommissioners of prizes, comptrollers of the accounts of the army, agents for regiments, commissioners for wine licences, and other incongruous offices.

The House of Commons (Disqualifications) Act, 1801 (41 Geo. III, c. 52), s. 4, disqualifies a number of holders of office in Ireland from sitting in the Parliament of the United Kingdom, and

The Public Offices (Ireland) Act, 1817 (57 Geo. III, c. 62), abolishes a number of Irish offices, making provision for a new regulation of their duties and for the disqualification of persons holding any offices created in consequence of such regulation.

NOTE II

Summary of Principal Statutes concerning the Parliamentary Oath

Oath of supremacy required to be taken before the Lord Steward by knights and burgesses. (5 Eliz. c. 1, s. 16.)

Oath of allegiance by the same persons in the same manner. (7 Jac. I, c. 6, s. 8.)

Oaths of allegiance and supremacy to be taken and subscribed and declaration against transubstantiation to be made by Lords and Commons in Parliament under penalty of £500 for every time of sitting and voting. (30 Car. II, st. 2, c. 1.)

The forms of these oaths altered. (1 Will. & Mary, c. 8.)

Oath of abjuration required of Lords and Commons as a condition precedent to sitting and voting, this oath containing the words 'on the true faith of a Christian.' (13 Will. III, c. 6.)

The form of oath altered in some respects, but the concluding words of the abjuration oath retained and penalty imposed (£500). (1 Geo. I, st. 2, c. 13.)

Forms of affirmation provided for Quakers. (8 Geo. I, c. 6, amending or embodying earlier provisions in their favour. 22 Geo. II, c. 46.)

Oath suited to Roman Catholics provided by Roman Catholic Relief Act, 1829 (10 Geo. IV, c. 7, s. 2).

Quakers and Moravians allowed to affirm. (3 & 4 Will. IV, c. 49.)

Ex-Quakers, ex-Moravians, and Separatists allowed to affirm: Quakers and Moravians Act, 1833 (1 & 2 Vict. c. 77).

A single oath substituted for the oaths of allegiance, supremacy, and abjuration. (21 & 22 Vict. c. 48.)

Power given to either House by resolution in case of individual members of Jewish religion to omit the words 'upon the true faith of a Christian': Jews Relief Act, 1858 (21 & 22 Vict. c. 49).

Power given to the House of Commons to make Standing Order to the same effect. (23 & 24 Vict. c. 63.)

Form of oath prescribed omitting these words, and also form of affirmation to be taken by every person 'for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath': Parliamentary Oaths Act, 1866 (29 Vict. c. 19), ss. 1, 4.

Promissory Oaths Act, 1868, shortens the previous form. (31 & 32 Vict. c. 72.)

Oaths Act, 1888 (51 & 52 Vict. c. 46), enables any person who objects to being sworn, on the grounds either that he has no religious belief or that the taking of an oath is contrary to his religious belief, to make a solemn affirmation when and wheresoever the taking of an oath is required by law.

Section II

Who may choose

The Franchise.

The right to vote for members to serve in the House of Commons is called the Franchise. The term Franchise is used indifferently for the right to vote and the qualification which confers the right. Strictly its meaning should be confined to the right. There is a third and distinct meaning in which the word signifies an incorporeal hereditament,

and is defined by Blackstone as 'a royal privilege or branch of the Crown's prerogative subsisting in the hands of a subject.'

Until very recently the qualifications which gave the right to choose a member for a county differed in many respects from those which gave the right to choose a member for a borough. They are now assimilated.

A mediaeval election.

The link between the borough and county representation is to be found in the form of writ, which until 1833 was addressed to the sheriff, commanding him to cause the election of two knights of his shire, together with two citizens of each city, and two burgesses of each borough, within the shire. The election took place 'in pleno comitatu,' and, from the year 1406 onwards, at the next meeting of the county court after the writ was received. So soon as the writ was received from the office of the Crown in Chancery, the sheriff issued his precept to the returning officers of the cities and boroughs, and announced the holding of a special county court for the purpose of the election. The towns made their election in accordance with the custom and procedure which had settled the franchise in each borough. The county court, when it met, was adjourned from day to day during such time as the poll might legally be kept open. At the close of the poll for the county election the result of that election was declared, and the knights of the shire were girt with swords in compliance with the terms of the writ. By this time the returns to the precepts had come in from the towns, the notification of their choice was made, and the formal election took place accordingly.

By 7 Hen. IV, c. 15 (1406), the sheriff was required to return the writ to Chancery, and not, as heretofore, to the Parliament, and he was further required to append to the writ indentures in which the names of the persons chosen were to be written 'under the seals of them that did choose them.' These indentures ensured that the persons returned were the persons elected by the county, and were not the arbitrary choice of the sheriff. A like precaution was taken in 1444[1] in respect of the towns.

Supra, p. 63.

[1] 23 Hen. 6, c. 15.

So, after the declaration of the poll for the county election, a certain number of the electors present set their hands and seals to the indentures containing the names of those elected, and these, fastened to the writ, were returned, together with the precepts and indentures relating to the towns, to the Clerk of the Crown in Chancery.

Such was the form of a Parliamentary election down to 1853, when it was enacted [1] that the writs for cities and boroughs should be sent direct to the returning officers of those places, and should no longer pass through the hands of the sheriff.

The old procedure,

This outline of the procedure of an election may serve to show that county and borough members were held together not merely by the interests which they had in common against the Crown and the magnates, nor by the representative character which they alike possessed, but also by the fact that they were all returned to Parliament through the same local machinery, that of the county court.

its effect on the franchise.

And from this procedure one may also understand how it came about that, before the Reform Act of 1832, the county franchise was simple and uniform, the borough franchise complicated and various, that it was to the county elections that one looked for a genuine expression of political opinion, when the electoral rights of a large number of the boroughs had so far become pieces of private property that a man might, by purchase or inheritance, acquire the right of returning one or more members to Parliament. But the mode of conducting an election can be considered later. It is necessary first to ascertain who may choose members to serve in Parliament, or in other words what constitutes the qualification of an elector. How the electors may choose, in what constituencies and by what process, will form matter for a separate section.

The modern Franchise.

The Franchise now rests upon the Representation of the People Act, 1918,[2] a comprehensive statute which repealed in whole or in part over one hundred earlier statutes, beginning

[1] Parliamentary Elections Act, 1853 (16 & 17 Vict. c. 68), s. 1.

[2] 7 & 8 Geo. 5, c. 64. The Act was the outcome of a conference in 1917 of members of all parties presided over by Mr. Speaker Lowther; see the Report of the Speaker to the Prime Minister: 1917 (Cd. 8463).

with 8 Hen. VI, c. 7. It has added millions to those entitled to vote and has at the same time immensely simplified the law. It is the latest (it would be rash to say the last) of a series of statutes which, beginning with the Reform Act of 1832, have progressively increased the number of the electorate, until it does not fall far short of manhood (and womanhood) suffrage. The steps by which this result has been attained are still worth the attention of the student of constitutional law.

The two grounds on which the right to vote now rests are primarily Residence and Occupation; that is to say, under various conditions, to be dealt with hereafter, a man has a vote in respect of a tenement which is his dwelling, or which he uses. A woman has the right either in virtue of the possession of an occupation qualification of her own, or because she is the wife of a man who possesses a certain occupation qualification. The right to vote was conditional upon residence when our representative system began: for it was coincident in the counties with the right to attend the county court,[1] while amid the obscurity which rests on the early history of the borough franchise this much is clear, that whether the right to vote depended on the holding of land or on contribution to local burdens, residence was in either case required, or perhaps it might be more true to say that non-residence was not contemplated. By 1 Hen. V, c. 1, residence was required alike of members and of electors; but this statute had fallen out of use two centuries before it was repealed in 1774. The Act of 1918 is therefore in this respect a revival of ancient practice. But what there is to say on this part of the subject may be conveniently divided as follows:

Divisions of subject.

1. The English county franchise,
2. The English borough franchise,
3. The Scotch franchise,
4. The Irish franchise,

} before 1918.

5. The effect of the Representation of the People Act, 1918.
6. Disqualifications and incapacities.

[1] See Stubbs, Const. Hist. ii. (5th. ed.) 214, as to constitution of county court.

§ 1. *English County Franchise before* 1918.

The suitor to the County Court.

We will take first the modifications of the county franchise before 1918. The right to vote for the representative knights of the shire was vested originally in those who were entitled to attend the county court; and by 7 Hen. IV, c. 15, the election was to be made at the next meeting of the county court after the receipt of the writ, and the return of the writ was to be accompanied by indentures under the seals of the electors to ensure the identity of the man chosen with the man returned. But when the county court had lost much of the business which gave it importance, the attendance was apt not to be representative. The next meeting of the county court might occur too soon after the receipt of the writ by the sheriff for a full meeting to be summoned, and so it might happen that the election would fall into the hands of the sheriff, or of a few interested persons or of a disorderly crowd.

The forty-shilling freeholder.

In the year 1430 was passed the Act [1] which determined the county franchise for 400 years, limiting its exercise to residents possessing a freehold worth forty shillings a year. The sheriff was empowered to examine voters upon oath as to their qualification, and an Act of 1432 required that the freehold should be situate and the voter resident in the county for which the vote was claimed. The last requirement fell into disuse, and was abolished by 14 George III, c. 58.

The Act of Henry VI was not, as it has been sometimes described, an aristocratic revolution, though the qualification was high. It was designed to secure orderly elections, and impose such a qualification as should exclude the casual crowd which attended the county court. At any rate it does not seem to have altered the character of the representation in the mediaeval Parliaments [2]; the forty-shilling freeholder chose the same class of representative as the suitors at the county court had chosen. In course of time the qualification was extended to other freehold interests than tenancies for life, in tail or in fee, namely to leases for

[1] 8 Hen. 6, c. 7.

[2] Stubbs, Const. Hist. iii. (5th ed.) 114.

lives, annuities, rent charges, and freehold offices if of the necessary value, and subject to certain conditions as to length of tenure previous to the election [1]. The reforms of 1832 and 1867 introduced other qualifications confined to counties and depending not upon property but upon occupation.

Act of 1832.

First as to Property. The Reform Act of 1832 confined the effect of the forty-shilling freehold qualification to cases in which the property was in occupation of the voter; or where it was an estate of inheritance; or, if a life estate and not in occupation—then, where it had been acquired by marriage, marriage-settlement, devise or promotion to a benefice or office.

Besides the retention of the ancient freehold qualification in this limited form, the Reform Act introduced four other property and non-residential qualifications into counties. These were (*a*) freehold for life not occupied, nor acquired as above described, of the clear yearly value of £10; (*b*) copyhold, or land held on any other tenure but freehold, of the same value; (*c*) leasehold of the same value and for a term originally created for not less than sixty years; and (*d*) leasehold of £50 clear yearly value, and for a term originally created for not less than twenty years.

Act of 1867.

The Representation of the People Act of 1867 reduced the value required for the first three of these franchises to £5.

By Occupation.

Next as to Occupation. The Reform Act created an Occupation franchise in counties for the occupier 'as tenant of any lands or tenements for which he should be liable to

Act of 1832.

the clear yearly rent of £50.' Besides this, the sub-lessee or assignee of an underlease of interests (*c*) and (*d*) above described could vote in respect of them if in occupation.

Act of 1867.

Alongside of this was created a new occupation franchise in counties by the Act of 1867. This depended not upon rental but upon rating, and the qualifying land or tenement had to be of the rateable value of £12.

The Act of 1884.

The Representation of the People Act, 1884,[2] did not affect

[1] Blackstone, i. 173; Porritt, History of the Unreformed House of Commons, i. 22.

[2] 48 Vict. c. 3.

the property qualification, with the exception of leaseholds, the qualifying yearly value of which was reduced to £5, if originally created for a term of not less than sixty years, £50 being retained in the case of leaseholds originally created for a term of not less than twenty years.

The occupation franchise was extended to the occupier as owner or tenant of any land or tenement of the clear yearly value of £10. Residence was not required, but the land or tenement must have been rated to the poor-rate and all rates upon them must have been paid.

The Act also extended to the counties the two new franchises which had already been created by the Act of 1867 for the boroughs—that of the householder or inhabitant occupier, and the lodger. It will be convenient to describe these in detail when we discuss the borough franchise generally.

Such was the English county franchise before the Act of 1918.

§ 2. *English Borough Franchise before* 1918.

Qualifications in boroughs before 1832.

The condition of the borough franchise before 1832 exhibits a curious medley of political rights[1]: for the boroughs were left free from all legislative interference as to the mode in which they should elect their representatives: all that was required was that the persons returned should be the persons really chosen, and that they should be fully empowered to bind their constituents. To this end an Act of 1444[2] required that the return made by the mayor, or bailiff of the borough, to the sheriff's precept, should be accompanied with indentures similar to those which accompanied the return of the county election,[3] made under the seals of those that chose the member. As the boroughs were thus left to choose their own mode of election, the result was, as one would naturally expect, a great variety of custom, amid which it is not easy to frame any certain or coherent scheme of electoral rights. Nevertheless, though

[1] For a fuller account of the borough franchise before 1832 see Porritt, History of the Unreformed House of Commons, vol. i, ch. i.

[2] 23 Hen. 6, c. 15. [3] 7 Hen. 4, c. 15.

modified in themselves, and combined with one another in various ways, four sorts of franchise appear distinct in character if not in origin.

Tenure. The first of these was based on tenure. This was probably the most ancient, and in most cases represented the right of the members of the township, as evidenced by the holding of land, to take part in the management of the affairs of the community.

Residence. The second was dependent on residence, in almost all cases coupled with payment of 'scot and lot,' that is, contribution to charges for local or national purposes. This would seem to be an extension of the land-holding qualification to those who bore their share of the burdens of the community.

Incorporation. The third was incorporation, and seems to connect political with trading privileges by the assignment of the franchise to the freemen of the chartered town either exclusively or jointly with voters otherwise qualified. The freeman, by his admission to membership of the Corporation, acquired rights but did not of necessity incur liabilities. He need not hold land nor incur the obligations laid upon land, nor contribute in his character of freeman to the local charges.

Corporate office. The fourth qualification was corporate office, a narrower form of the right arising from incorporation. This was the latest of the qualifications, and vested in the officers of the chartered town the right to return representatives to Parliament. It will be found that in all the cases in which the franchise was thus limited, the town in question was either chartered or summoned in the reigns of the Tudors, or else that the limitation was fixed by a resolution of the House of Commons, subsequent to the Restoration, based upon an interpretation of the charter. In the case of such a resolution, the inhabitants sometimes urgently contested the right with the corporation, as in the case of Bath, Malmesbury, and Salisbury[1]. Sometimes, as in the case of Wilton and Winchester, they acquiesced without a struggle.

[1] I have taken these facts, and others which follow, as to particular boroughs from Oldfield's History of Representative Government, checking his statements by reference to the Commons' Journals.—Author's Note.

But each of these kinds of qualification admitted of many varieties. The qualification by tenure in some towns which were also counties, as Nottingham and Bristol, was the forty-shilling freehold, in others it was land held on burgage tenure ; in some cases it was limited to particular tenements, as at Richmond, where they only might vote who held burgage tenements carrying with them the right to have pasture on a certain common field. At Cricklade the qualification was not only freehold, but copyhold of lands held within the borough ; or leasehold of a term of not less than three years. At Clitheroe, the franchise was in the *owners* of burgage tenements though non-resident ; but if they did not choose to exercise their rights, then the *occupiers* of the tenements became entitled to vote.

Varieties in qualification by tenure.

The qualification by residence extended, at Preston, to all the inhabitants ; at Taunton to those who had a parochial settlement and were self-supporting, the ' potwallopers ' who boiled their own pot : in a great majority of cases it was a necessary feature of the qualification that the voter should be a householder and contribute to local rates and taxes, ' scot and lot ' ; but it would seem that in some cases the contribution to local burdens, coupled with residence, might give a vote to one who was not a householder.

Varieties in qualification by residence.

The qualification of the freeman might be acquired in various ways,—by birth, by marriage with the daughter or widow of a freeman, by apprenticeship or servitude, by purchase, or by gift. The mode of acquisition was different in different towns, and where it lay in the power of the corporation to give the freedom to whom it pleased, the creation of freemen for election purposes was unlimited[1]. In some boroughs the freemen were required to be resident in order to obtain the franchise ; in others they were scattered over the country. In the first case they were usually corruptible on the spot, in the second the cost of carriage was added to the cost of the vote.

Varieties in qualification of freeman.

Where the right to return members lay with the officers of the corporation, the constituency would depend on the composition of the governing body created by the charter.

[1] Municipal Corporations Commissioners' Report, i. 35.

Complexity of borough franchise.

From what has been said it will be seen that neither the condition of the borough franchise in the middle ages, nor the mode of its exercise, is very easy to determine. When the House of Commons began to determine disputed returns, we get such knowledge of the franchise in the seventeenth century as shows us clearly that it could never have been uniform; and such accounts as we have of mediaeval elections[1] seem to suggest that the whole body of electors not unfrequently entrusted the choice of their representative to a committee, sometimes consisting of the municipal officers, sometimes selected from them or from the whole electorate, or from both.

As we approach the time when political interest grows stronger, and a seat in Parliament becomes a thing to be desired, we find three influences acting upon the condition of the franchise, all tending indirectly to narrow, to confuse, and to corrupt the right of voting in the towns.

Effect of charters of incorporation:

First, we may put the increase of charters of incorporation granted to towns from the time of Henry VI onward. From this period the object of such charters was not so much to confer new privileges as to define the rights of the townsmen *inter se*, and to organize the corporate government. The process by which the merchant guild of a town became identified with the older town community is part of municipal history with which we are not here concerned, except in so far as the Parliamentary franchise came thereby to be vested, either exclusively or jointly with other voters, in the freemen of a corporate town.

But it is to this influence that we must attribute the acquisition by the official members of the corporation of the exclusive right to elect the representatives of the borough. In some cases this was directly conferred by charter, in others it was assumed by the governing body of the corporation, but here too the claim was based upon the charter and was admitted by committees of the House of Commons.

of the Tudor boroughs:

Next, we must put the grant, either by summons or by charter followed by summons, of the right of representation

[1] Stubbs, Const. Hist. iii (5th ed.) 417–421.

to towns which were never meant to represent anything but the influence of the Crown in Parliament. Thus, at the commencement of the Tudor additions to the representation, six Cornish boroughs returned twelve members; at their conclusion twenty-one Cornish boroughs returned forty-two members. In the majority of these towns the franchise was vested in the corporation, and they would indirectly affect the condition of the franchise elsewhere, for they would offer analogies and precedents, in other cases where rights of election were in issue, to election committees of the House of Commons. Such precedents would operate with the more force, because some of those who judged of the returns themselves owed their seats to this corrupt and restricted franchise.

of decisions of House of Commons.

And this brings us to the third influence exercised upon elections—the decision of disputed returns in election committees of the House of Commons. The history of this privilege of the House and the mode of its exercise are described later. Here we need only note the effect upon electoral rights, in the different boroughs where they were called in question, of the decisions of a tribunal unsuited for judicial work, often animated by partisan or personal feelings, and inclined from self-interest to narrow the franchise. When once a committee had declared an election to be invalid on the ground that the votes of a particular class of voters had been accepted or rejected, the right of that class was settled and the custom of the borough fixed. In 1729 an Act[1] was passed providing that 'the last determination in the House of Commons' should settle the legality of votes.

It is not necessary, nor would it be desirable here, to discuss the merits and demerits of the borough franchise such as it had become by the year 1832. That franchise had developed absolutely free from legislative interference. Except in the case of boroughs convicted of notorious corruption, whose right to return representatives had, in consequence, been extended by Act of Parliament to the freeholders of the adjacent hundreds, custom and common

[1] 2 Geo. 2, c. 24, s. 4.

law, interpreted by the resolutions of Parliamentary committees, alone determined the right to vote.

That the representation was inadequate and corrupt there can be no doubt. When the qualification depended on tenure it would often happen that the qualifying tenements were very few in proportion to the population, or sometimes that the population had entirely disappeared, leaving the constituency to consist in the owner or owners of a few plots of land. Where the qualification was residence, or freedom, bribery was largely practised, and, where the freedom was in the gift of the corporation, freemen were created in great numbers to turn an election. It is hardly necessary to note the illusory character of a franchise vested in the officials of a corporation; one can only wonder that the mere absurdity of the representation of a town like Bath by members chosen by a body of twenty-four officials of the corporation should not have condemned a system which in the unchecked growth of centuries had assumed a form so grotesque.

Reform Act, 1832.

The Reform Act of 1832 made a clean sweep of these anomalies. It preserved all individual electoral rights vested at the date of the passing of the Act: but beyond this it abolished the old franchises with two exceptions.

Retention of old,

It retained the forty-shilling freehold qualification in towns which were counties, subject to the limitations imposed on the like qualification in counties. It further retained the qualification enjoyed by a freeman of a chartered town in those towns wherein the qualification had heretofore prevailed; but the modes of acquiring freedom were limited, for the purpose of the franchise, to birth and servitude, and residence in or within seven miles of the city or borough was made a part of the qualification.

creation of new qualifications.

Apart from these survivals of the old qualifications, the right to vote in cities and boroughs was made to rest uniformly upon *Occupation*. By s. 27 a qualification was given to the occupier, as owner or tenant, of any house, warehouse, counting-house, shop, or other building which either separately or jointly with other land occupied by him in

2 & 3 Will. IV, c. 45, s. 27.

the same city or borough is of the clear yearly value of £10. It was necessary for the occupier to have been rated in respect of his tenement, to have paid his rates, and to have resided, during six months before his registration as a voter, in or within seven miles of the place for which he claimed a vote. By the Registration Act [1] of 1878 the qualification extended to any *part* of a house separately occupied under the above conditions.

Such was the borough franchise from 1832 to 1867. The Representation of the People Act of 1867 introduced the Household and the Lodger franchise.

Residence.

To be entitled to the Household franchise a man had to occupy as owner or tenant, for twelve calendar months before the 15th of July in the year in which he claimed to be registered, a dwelling-house in the borough. He had to be rated to the poor-rate, and to have paid his rates before certain dates in the year of claim.

The householder.

It is important to note two points.

Definition of dwelling-house.

(*a*) The word ' dwelling-house ' was defined in the Act of 1867 as any part of a house occupied as a separate dwelling and *separately rated to the relief of the poor*. The definition was altered by the Registration Act of 1878 [1] in such a way as not to include separate rating as part of the qualification. An obvious difficulty arose in distinguishing the householder from the lodger. The householder's tenement had to be rateable though not separately rated, and rates paid in respect of it, but such rates need not be paid by the householder. If he occupied a part of a house, not separately rated, he was to be deemed a householder or a lodger according to his relations with the owner of the entire building[2].

Requirements as to payment of rates.

(*b*) The Act of 1867 required not merely that the dwelling-house should be rated but that the occupier should be rated and should pay the rates. In fact the Act intended the household franchise to depend upon the personal payment of rates by the voter, thereby preventing it from being acquired where the practice of compounding prevailed.

[1] 41 & 42 Vict. c. 26, s. 5.

[2] *Bradley* v. *Baylis*, 8 Q.B.D. 219.

'Compounding' meant that the owner was rated in lieu of the occupier and made his own terms with the overseer and the occupying tenant.

But the Poor-rate Assessment and Collection Act, 1869[1], provides that (1) an owner may agree in certain cases, with the overseers, or (2) may be compelled by the vestry to be rated instead of the occupier, or (3) may make his own terms with the tenant as to paying the rates, and in no case was the tenant to lose his vote by means of such a transaction between his landlord and the overseers or between his landlord and himself. The overseer is bound to enter on the rate-book every occupier of rateable premises, and the occupier was not to lose his vote by reason of an omission to do this on the part of the overseer. These provisions, 'ex abundanti cautela,' were made of general application by the Registration Act of 1878[2]. Such was the Household, more commonly called the 'Inhabitant Occupier', franchise. In the English boroughs it remained substantially unaffected by the Act of 1884, save that occupation in virtue of any office, service or employment was included as a qualification.

The lodger.

The Lodger franchise was given by the Act of 1867 to one who has resided in the same lodgings as a sole tenant for twelve months next preceding the 31st of July[3] in the year in which he claims to be registered, such lodgings being of the clear yearly value unfurnished of £10. By the Act of 1878[4] the lodger might during his period of residence have occupied different lodgings in the same house without invalidating his vote, and might be a joint occupier with another if the total rent is equivalent to £10 apiece. This franchise also was unaffected by the Act of 1884.

§ 3. *The Scotch Franchise before* 1918.

Scotch franchise in counties:

Until the year 1832 the Scotch representative system was in a condition even more strange and anomalous than the English. The county qualification was twofold, (1)

[1] 32 & 33 Vict. c. 41, ss. 3, 4, 7, 8.
[2] 41 & 42 Vict. c. 26, s. 14. They are not affected by the Act of 1918.
[3] The date was altered to the 15th by the Act of 1878.
[4] 41 & 42 Vict. c. 26, s. 6.

a 'forty-shilling land of old extent' held of the Crown; or (2), if not of old extent, then rated in valuation books at £400 of valued rent.

The qualification was thus a purely freehold qualification under conditions more exacting than were required of the English freeholder.

in boroughs.

The boroughs elected their representatives on a still less popular franchise. Those entitled to be represented were the sixty-six royal burghs, of which Edinburgh alone had a member to itself. The others were divided into fourteen groups, of which each group was entitled to a member. On the occasion of an election the sheriff gave notice to the town council of each burgh; they each elected a delegate; the delegates met in their respective groups, and so elected the representatives of the burghs.[1]

Reform of 1832,

The legislation of 1832 [2] altered the distribution of seats and swept away the old franchises except in so far as individual vested interests were affected. It created property and occupation franchises in counties, and an occupation franchise in boroughs, following the model of the English franchises of that nature both in character and amount, except in so far as Scotch property law compelled differences of detail.

of 1868,

In like manner did the Scotch Reform Act [3] of 1868 reduce the property and occupation franchise in counties and introduce the household and lodger franchise in boroughs, leaving existing borough franchises intact.

of 1884.

Under the Act of 1884 lands and heritages in proprietorship of £5 yearly value as appearing in the valuation roll were included in the property qualification; and also leaseholds of £10 clear yearly value if for life or originally created for a term of not less than fifty-seven years, or of £50 clear yearly value if originally created for a term of not less than nineteen years.

The Act also (as in England) extended to the counties the Inhabitant Occupier and Lodger franchises created in the boroughs by the Scotch Act of 1868.

[1] A full account of the qualifications for the franchise and the conditions of representation in the unreformed Parliament is to be found in Porritt, The Unreformed House of Commons, vol. ii, part v.

[2] 2 & 3 Will. 4, c. 65. [3] 31 & 32 Vict. c. 48.

§ 4. *The Irish Franchise before* 1918.

The Irish borough and county franchise before the Reform Bill exhibited much the same features as the English representative system. The forty-shilling freehold had qualified for the franchise in counties from the earliest days of Irish Parliaments, but from the beginning of the reign of George I the exercise of the franchise had been confined to Protestants. In 1793 the Irish Parliament removed this, with other disabilities, and the forty-shilling freeholders became so important an element in the Parliamentary constitution that their action was largely instrumental in securing the admission of Roman Catholics to Parliament in 1829.

But in the year in which the Roman Catholic Relief Bill was passed a disfranchising bill also became law, by which no freeholder was entitled to vote for a county unless he had an estate of £10 a year.[1]

Reform of 1832,

The legislation of 1832 [2] swept away the old borough qualifications except, as in England, in certain cases of freemen, and of freeholders in towns which were counties, and introduced the occupation qualification and extended the qualification in counties to leaseholders and copyholders: this last a somewhat idle boon, since there is no copyhold in Ireland.

of 1850,

The franchise was further extended by an Act of 1850 [3] to £12 occupiers and £5 freeholders in counties, and to £8

of 1868,

occupiers in towns. In 1868, the lodger qualification was introduced in boroughs, as in England and Scotland; nevertheless the occupier's qualification was only reduced from £8 to £4.[4]

of 1884.

Under the Act of 1884 the following became the Irish property qualifications: freeholds of £5 net annual value; rent-charges and leases for life or lives of £20 clear annual value; leaseholds of £10 clear annual value if created originally for a term of not less than sixty years, and of £20

[1] 10 Geo. 4, c. 8. The reader must again be referred to Porritt, The Unreformed House of Commons, vol. ii, part vi, for an account of the Parliamentary franchise in Ireland before 1832. [2] 2 & 3 Will. 4, c. 88.
[3] 13 & 14 Vict. c. 69 [4] 31 & 32 Vict. c. 49.

clear annual value if originally created for a term of not less than fourteen years.

The Act also gave the Inhabitant Occupier franchise to the Irish boroughs and counties and extended to the counties the Lodger franchise created in the boroughs by the Irish Act of 1868.

§ 5. *The Representation of the People Act*, 1918.

The Act of 1918.

We are now in a position to consider the Act of 1918, which finally assimilated the county and borough franchise and substituted a single statute for the tangle of legislation in which the franchise law of the United Kingdom had previously to be sought.[1] The Act abolishes the property qualification altogether in the counties; it bases the franchise for men in counties and boroughs alike on two qualifications only, residence and the occupation of business premises; it gives the franchise to women over 30 years of age based on an occupation qualification possessed either by themselves or by their husbands; and it creates a new franchise, the naval and military franchise. The university franchise is retained and extended.

The Act makes important amendments in the law of registration and is at the same time a Redistribution Act;[2] but these are matters which it will be more convenient to deal with separately.

We will now consider in more detail the qualifications for the franchise in the case of (*a*) men, (*b*) women, (*c*) naval and military voters, and (*d*) university voters. It is to be observed that the Act of 1918 deals not only with the parliamentary, but also with the local government, franchise; and it is necessary to consider in this place the nature of the local government franchise, because in the case of women the right to vote at Parliamentary elections depends on the possession by herself or her husband of qualifications necessary for that franchise.

[1] See s. 42.

[2] For England, Scotland and Wales. The redistribution of seats in Ireland was dealt with by the Redistribution of Seats (Ireland) Act, 1918 (7 & 8 Geo. 5, c. 65).

Men.

A man is entitled to be registered as a Parliamentary elector if he possesses either of two qualifications :

(i) a *residence* qualification ;

(ii) a *business premises* qualification.

The residence qualification.

(i) To possess the residence qualification he must on the last day of the ' qualifying period ' (that is, a period of six months ending on a certain date before the register is made up) be residing in the constituency, and must during the whole of the qualifying period have resided in premises, though not necessarily the same premises, in the constituency.[1] But in order that he may not be deprived of his vote because he happens to have moved his residence from one part of the same neighbourhood to another which happens to lie in a different constituency, it is provided that residence during a part of the qualifying period will be equally effective (*a*) in another constituency in the same Parliamentary borough or county, or (*b*) in a contiguous Parliamentary borough or county or one separated by not more than six miles of water. For the purpose of this provision the administrative county of London is treated as a single Parliamentary borough ; and hence residence in two or more of any of the London constituencies (or in a parliamentary county or borough contiguous to London) during the qualifying period will entitle the elector to be registered in that constituency in which he was resident on the last day of the period.[2] In order, however, to prevent the creation of votes in contemplation of an election, an elector cannot be registered if he commenced to reside in the constituency within thirty days before the end of the qualifying period and ceased to reside within thirty days after the time when he so commenced to reside.[3]

Residence as an inmate or patient in any prison, lunatic asylum, workhouse or other similar institution, does not constitute residence for the purpose of this qualification. But residence in a house is not deemed to be interrupted by the letting of the house as a furnished house for a part of the qualifying period not exceeding four months in all.[4]

[1] S. 1. [2] S. 1 (2) (*b*). [3] S. 7 (3). [4] ss. 7 (2) and 41 (5).

Payment of rates no longer necessary.

It will be seen that no question of rateability to the poor rate or the payment of rates now arises in connexion with this franchise. Mere residence is the only test. The lodger no longer possesses the franchise as such, but he may of course obtain a qualification by the fact of residence during the qualifying period. It must also be noticed that though residence is not interrupted by the letting of a furnished house for a part of the qualifying period, section 7 (2) of the Act expressly provides that this provision 'shall not affect in any way the general principles governing the interpretation of the expression "residence" and cognate expressions'. Hence reference will still have to be made to the previous law on the meaning of the word 'residence' in doubtful cases. A man may continue to be resident in a house, without necessarily sleeping there every night; and by a later Act [1] residence is not interrupted by absence not exceeding four months at any one time in the performance of any duty (e. g. military service) arising from or incidental to any office, service, or employment. But an undergraduate occupying college rooms from which he is excluded in the vacation would not be entitled to vote in respect of his rooms.

The business premises qualification.

(ii) To possess the business premises qualification a man must on the last day of the qualifying period be occupying business premises in the constituency and must during the whole of the qualifying period have occupied business premises, though not necessarily the same premises, in the constituency. The rules for the residence qualification with regard to residence during part of the qualifying period in neighbouring constituencies apply, *mutatis mutandis*, in the case of the business premises qualification.[2] Occupation of business premises, however, within only thirty days of the end of the qualifying period does not, as it may do in the case of the residence qualification, prevent a qualification from being acquired.

'Business premises' means land or other premises of the yearly value of not less than £10, occupied for the purpose

[1] Representation of the People Act, 1921 (11 & 12 Geo. 5, c. 34), s. 1 (1); and cf. *Atkinson* v. *Collard*, 16 Q.B.D. 254: *Tanner* v. *Carter*, 16 Q.B.D. 231.

[2] s. 1 (2).

of the business, profession or trade of the elector; and, as in the case of the residence qualification, no question as to rateability or payment of rates arises.[1]

Women.

The Woman's franchise,

No woman can be registered as a parliamentary elector unless she has attained the age of thirty years. Subject to this, she possesses the parliamentary franchise (*a*) if she is entitled to be registered as a local government elector in respect of the *occupation* in the constituency of lands or premises of the yearly value of not less than £5, or of a dwelling-house (or part of a dwelling-house separately occupied) of any value, or (*b*) if she is the wife of a husband who is entitled to be so registered.[2]

based upon the local government franchise.

In order to understand the meaning of these provisions, it is necessary to see how a man or a woman becomes entitled to be registered as a local government elector. For this purpose he (or she) must on the last day of the qualifying period be occupying as owner or tenant any land or premises in the local government area, and must during the whole of the qualifying period have so occupied them; but for the latter purpose occupation during part of the qualifying period of land or premises or a dwelling-house in any administrative county or county borough in which the local government area is wholly or partly situate will be equally effective.[3] As in the case of the parliamentary residence qualification, where the occupation commenced within thirty days before the end of the qualifying period and ceased within thirty days after such commencement, the right to be registered is not acquired even though there was occupation on the last day of the period. This is to prevent the creation of votes for the purpose of a particular election.[4]

A lodger is only to be regarded as a tenant in the case of unfurnished lodgings; and a person who occupies a dwelling-house in virtue of any office, service or employment is deemed to occupy as a tenant if the dwelling-house is not inhabited by the person in whose service or employment he or she may

[1] s. 1 (3). [2] s. 4 (1). [3] s. 3. [4] s. 7 (4).

be.[1] Occupation of a dwelling-house, as in the case of residence, is not interrupted by the letting of the house furnished for not more than four months of the qualifying period.[2]

Difference between the two franchises.

Whilst the woman's parliamentary franchise is based upon the local government franchise there are substantial differences between the two. A woman, like a man, can acquire the local government franchise at the age of twenty-one if she is herself an occupier, but she is not entitled to the parliamentary franchise until she attains the age of thirty ; and whereas the occupation by a woman of *any* land or premises gives her a right to the local government franchise, in the case of the parliamentary franchise the land or premises occupied (if not a dwelling-house) must be of a yearly value of not less than £5. On the other hand, whilst a married woman acquires the parliamentary franchise if her husband is entitled to be registered as a local government elector in respect of his occupation of any land or premises of a yearly value of not less than £5 or of a dwelling-house, she is not entitled to the local government franchise in virtue of the occupation of premises by her husband save in the case of a dwelling-house in which they both reside. The woman's parliamentary franchise is thus on a narrower basis in some respects and wider in others than her local government franchise.

The woman's parliamentary franchise in Scotland is slightly different, but substantially the qualifications are the same ; and the rules with regard to the meaning of the word ' tenant ' and with regard to occupation which begins within thirty days before the end of the qualifying period are also the same in both countries.[3]

Naval and Military Voters.

The Naval and Military franchise.

The conditions of naval or military service made it difficult for sailors and soldiers to acquire the necessary qualification under the previous law and the new franchise was designed to remedy this state of things. At the same time the franchise was extended to other persons (including

[1] s. 3, provisos (i) and (ii). [2] s. 7 (2). [3] s. 43 (4).

women) who are engaged in duties analogous to naval or military service.

A naval or military voter is a person who would be entitled to be registered as a parliamentary elector in any constituency but for his (or her) service.[1] That is to say, a sailor or soldier who is able to show that he would, but for the fact that he is serving in the Navy or Army, be qualified in respect of residence, occupation of business premises or otherwise, to be registered, is entitled to be registered, not as an ordinary voter, but as a naval or military voter. He is not deprived of the right to be registered as an ordinary voter, if in fact, despite his service, he possesses the necessary qualifications; but in that case he must make a special claim and give proof that he has taken reasonable steps to prevent his being registered as a naval or military voter in any other constituency.

The qualifying period in the case of a naval or military voter is one month instead of six; and this rule applies also in the case of any person who has been serving as a member of the naval, military, or air forces of the Crown at any time during the six months' period applicable in the case of the ordinary elector, and has ceased so to serve.[2]

Special provisions in the Act enable male naval or military voters who served in or in connexion with the late war to be registered as parliamentary electors if they attained the age of nineteen years either at the commencement of, or during, their service.[3]

Meaning of 'naval or military voter'.

The persons entitled to become naval or military voters are the following:

(*a*) persons serving on full pay as members of the naval, military or air force of the Crown;

(*b*) persons who are abroad or afloat in connexion with any war in which the Crown is engaged: (i) in service of a naval or military character and paid for out of moneys provided by Parliament or, in the case of persons resident in the United Kingdom at the commencement of the service, out of public funds of any part of the British Dominions; (ii) in service as a merchant seaman, pilot or fisherman;

[1] s. 5. [2] s. 6. [3] s. 5 (4).

(iii) serving in any work of the British Red Cross Society or the Order of St. John of Jerusalem or other similar body; or (iv) serving in any work recognized by the Admiralty, Army Council or Air Council as work of national importance in connexion with the war.[1]

University Voters.

The University franchise was introduced for the first time by the legislation of 1867 and 1868, and is retained by the Act of 1918. It now extends to women of thirty years of age and over. The University franchise.

The Universities of Oxford, Cambridge, London and Wales each form a constituency. Seven other English Universities and the four Scottish Universities are grouped into two constituencies. There is one University constituency in Northern Ireland.

Graduates of the English Universities, the Chancellor, the Professors and the members of the University Court and General Council of the Scottish Universities, and graduates of the Queen's University of Belfast, are entitled to vote for their respective University constituencies, and the Universities are, as we shall see, the first Parliamentary constituencies to vote on the principle of proportional representation. In the case of a University which does not admit women to degrees, a woman is none the less entitled to vote if, but for the prohibition, she would have been entitled to a degree.[2]

Certain points of importance remain to be mentioned. Plural voting.

Firstly, the right of plural voting is now severely restricted. Section 8 (1) of the Act of 1918 provides that a man shall not vote at a general election for more than one constituency for which he is registered by virtue of a residence qualification, or for more than one constituency for which he is registered by virtue of other qualifications of whatever kind; and that a woman shall not vote at a general election for more than one constituency for which she is registered

[1] s. 5 (3). [2] ss 2, 4 (2).

by virtue of her own or her husband's local government qualification, or for more than one constituency for which she is registered by virtue of any other qualification.[1] The effect of these provisions is in substance that neither a man nor a woman can vote at a general election in more than two constituencies at most. A man can vote in a constituency where he is qualified by residence, and he can vote at the same time in another constituency where he has a business premises qualification or (in the case of a University constituency) a graduate's qualification. Similarly, a woman can vote in one constituency where she (or her husband) has an occupation qualification, and in a University constituency where she has a graduate's qualification. But neither a man nor a woman can vote at a general election in two constituencies in respect of the same qualification, whether it be residence, business premises, occupation or graduate's, in each.

Joint occupation

Secondly, joint occupation of business premises, of land or premises or of a dwelling-house confers the franchise (provided all other conditions are satisfied) on the joint occupiers if the aggregate yearly value is proportionate to the number of occupiers. It will be remembered that for a single occupier the figure is £10 or £5, as the case may be. But not more than two joint occupiers can be registered in respect of the same land or premises, unless they are bona fide engaged as partners in carrying on their profession, trade, or business on the land or premises.[2]

Summary.

It remains to summarize the effect of the Act of 1918. There is now a practically uniform franchise for the whole of the United Kingdom in counties and boroughs alike.

The qualifications for the male voter are *residence* or the *occupation of business premises* of the yearly value of £10; for the female voter, the *occupation* (either by herself or her husband) *as owner or tenant* of lands or premises of the yearly value of £5, or of a dwelling-house. Residence or occupation during the qualifying period in neighbouring constituencies is as effective as residence or occupation in the constituency itself.

[1] s. 8 (1). [2] s. 7 (1).

Persons on naval and military service or occupied in certain analogous duties are entitled to be registered as naval or military voters, if, but for their service, they would have been entitled to be registered as ordinary voters.

Graduates of Universities vote in their University constituencies.

§ 6. *Incapacities and Disqualifications.*

Sex.

1. The franchise is, as we have seen, no longer limited to persons of the male sex. An attempt had previously been made to argue that s. 3 of the Representation of the People Act, 1867, conferred the franchise upon women. The word 'man' is there used to describe the persons entitled to vote; the Reform Act, 1832, had used the words 'male person' for this purpose, and in the mean time an Act (13 & 14 Vict. c. 21) had provided that 'in all Acts words importing the masculine gender shall be deemed and taken to include females unless the contrary is expressly provided.' But the Court of Common Pleas held firstly that since the Acts of 1832 and 1867 were to be read together, the words used in the Act of 1832 amounted to an express provision that 'man' did not include 'woman' in the Act of 1867; and secondly that the qualification was conditional on the absence of legal incapacity, and that women were at Common Law incapable of exercising the Parliamentary franchise.[1]

The question was again raised on appeal to the House of Lords from the Court of Session, Scotland, in 1908. It was contended that women graduates of the Scotch Universities were entitled to vote at an election of University members. The ladies, who argued their own case, contended that they were 'persons whose name was on the register of the general council of their University' and thus acquired the qualification conferred on such persons by the Representation of the People (Scotland) Act, 1868. But it was held that 'persons' could not be held to include women unless by express words signifying that they were intended to be so included; and

[1] *Chorlton* v. *Lings*, L. R. 4 C. P. 374.

further, that the words were limited in the section quoted to ' persons not subject to any legal incapacity '.[1]

Age

2. Infancy, whether or no it be a disqualification at Common Law, is expressly made a disqualification under the Act of 1918, which provides in the case of every franchise that every person registered as a parliamentary elector must be of full age.[2] For the purposes of registration a person's age is taken to be his age on the last day of the qualifying period.[3] In the case of women, as we have seen, the age is thirty and not twenty-one.

The special case of male naval and military voters who served in the late war has already been noted.[4] They were allowed to be registered at the age of nineteen.

Peerage.

3. No Peer other than a Peer of Ireland who has been actually elected and is serving as a member of the House of Commons has a right to vote. This disability appears to have rested on usage, and on repeated resolutions of the House of Commons, which though they could not make the law must be regarded as high authority on the rules of electoral law ; it is now finally settled by a decision of the Court of Common Pleas in 1872 upon the appeal of Earl Beauchamp against the overseers of Madresfield.[5] ' Upon the authorities as well as upon principle,' said Bovill C. J., ' I am clearly of opinion that a peer of Parliament has no right to vote in the election of members of the House of Commons '.[6] But the incapacity does not extend to peeresses in their own right.[7]

[1] *Nairn* v. *University of St. Andrews* [1909], A. C. 147.

[2] Representation of the People Act, 1918 (7 & 8 Geo. 5, c. 64), ss. 1, 2, 3, 4, and 5.

[3] s. 41 (7).

[4] *Ante*, p. 126.

[5] L. R. 8 C. P. 252 ; and see *Marquis of Bristol* v. *Beck*, 96 L.T. 55.

[6] It was formerly the custom of the House of Commons to resolve each session that it was ' a high infringement of the liberties and privileges of the House for any Lord of Parliament or other peer or prelate . . . to concern himself in the election of members to serve for the Commons in Parliament.' Since 1911 this has been discontinued. A sessional order of the House of Commons could not of course affect the legal rights of persons outside the House, and would be in abeyance during a prorogation or dissolution of Parliament. The abstention of peers from political action at such times must be regarded as having been an act of courtesy extended by one House to the other.

[7] Representation of the People Act, 1918 (7 & 8 Geo. 5, c. 64), s. 9 (5).

Returning Officer.

4. Returning officers are not entitled to vote unless the votes for two candidates should be equal, in which case the returning officer, if a registered elector for the constituency, has a casting vote.[1]

Employment.

5. Employment of certain kinds is a disqualification. The disabilities formerly imposed on revenue, excise, and stamp officers were removed in 1868 and 1874, those which attached to the police in England and Scotland were removed in 1887. But there are still in Ireland disqualifications attaching to police and police officials. The disabilities connected with employment for the purpose of an election which once existed have, however, almost entirely disappeared.

At elections.

Persons employed by or on behalf of a candidate at an election are no longer disqualified from voting, so long as the employment is legal.[2] A disqualification formerly attaching in Scotland to town clerks and deputy town clerks and to the assessors of burghs and counties, a part of whose duties it is to attend to the registration of voters, is also now removed.[3]

Aliens.

6. An alien is disqualified from voting by the rules of Common Law and expressly by statute [4]; and from the rights conferred upon aliens by the British Nationality and Status of Aliens Act of 1914 [5] are expressly excepted the right to qualify, unless naturalized, for any office, or parliamentary or municipal franchise.

Mental unsoundness.

7. The right of a person of unsound mind to vote must depend upon the kind and degree of his mental infirmity. An idiot would unquestionably be disqualified; a lunatic, if so found upon commission, would probably be held to be disqualified; the question has not arisen, and the cases decided appear to relate to persons of known unsoundness of mind who were nevertheless not regarded as wholly incapable of other business. Their votes were allowed.[6]

Conviction of felony:

8. Conviction of treason or felony is a disqualification,

[1] Ballot Act, 1872 (35 & 36 Vict. c. 33), s. 2.
[2] Representation of the People Act, 1918, s. 9 (4).
[3] s. 43 (6). [4] s. 9 (3).
[5] 4 & 5 Geo. 5, c. 17, s. 3 (1).
[6] See cases collected in Rogers on Elections (ed. 19), vol. ii, p. 118.

unless either the term of punishment has been served or a free pardon has been obtained.[1] Corrupt practices at a parliamentary election are only a misdemeanour (except in the case of personation, which is felony), but a conviction for corrupt practices disqualifies the offender for seven years for voting at any election.[2] A candidate or agent guilty of certain illegal payments, or hirings not amounting to corrupt practices, is disqualified for that place for five years.

of corrupt practices.

Alms.

9. A person is no longer disqualified from being registered or from voting on the ground that he or some person for whose maintenance he is responsible has received poor relief or other alms.[3]

Conscientious Objectors.

10. It is sufficient to note the provisions in the Representation of the People Act, 1918,[4] which, subject to certain exceptions, disqualify conscientious objectors under the Military Service Acts for a period of five years from the termination of the late war.

Section III

How they may choose

§ 1. *Distribution of Seats.*

First it is necessary to ascertain what are the constituencies which choose members for the House of Commons. The present distribution of seats depends upon very recent legislation, but it is necessary to indicate, however slightly, the shares of representation which different parts of the country respectively enjoyed at different periods before the Act of 1918.

To the Model Parliament of 1295 were summoned two knights from each shire, two citizens from each city, two burgesses from each borough ; and it seems clear that the sheriff directed his precept to such towns as he considered qualified within the terms of the writ.

[1] Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 2.

[2] Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), ss. 6, 10.

[3] Representation of the People Act 1918, s. 9 (1).

[4] 7 & 8 Geo. 5, c. 64, s. 9 (2).

Number of county members.

The county representation underwent little alteration down to 1832; it was varied only by the addition of counties previously unrepresented. In 1536 Monmouth acquired the right to send two members, and each Welsh county one. The counties palatine of Cheshire and Durham were placed on a footing with the others in respect of representation in 1543 and 1673 respectively. The Union with Scotland added thirty members for counties, out of a total addition of forty-five, and the Union with Ireland sixty-four out of a hundred.

Number of borough members.

But the number of represented boroughs fluctuated considerably during the middle ages. In the reign of Edward I 166 were summoned to return members, but the normal or average number which actually sent members appears to have been 99, of which London assumed, and by custom acquired, the right to return four.

Causes of fluctuation.

The towns were not very anxious to return members, for the members had to be sent to Westminster or wherever the Parliament assembled, and maintained at the expense of their constituents.[1] Again, for purposes of taxation, the borough which returned members was rated higher than the county in the proportion of a tenth to a fifteenth,[2] while the town which returned no members shared the rating of the county. And in addition to the unwillingness of the towns we must take into account the action of the

[1] The payment of their members appears to have been a common law liability of the constituencies. The knights, citizens, and burgesses took home with them their writs *de expensis levandis* as a matter of course at the conclusion of a session. The customary charge was 4*s*. a day for a knight of the shire and 2*s*. a day for a citizen or burgess, and days necessarily occupied in travelling between the constituency and the place where the Parliament assembled were included. These charges were secured by 35 Hen. 8, c. 11 (repealed 1856), in the case of the newly enfranchised counties and towns in Wales and Monmouth. As a seat in Parliament became more of an object of ambition, members promised, at elections, to serve without payment (4 Parl. History, p. 843). The right remained in existence, and in 1681 Lord Nottingham decided in favour of a member for Harwich who sued his constituents for his wages. Lord Campbell, writing in 1846, expresses an opinion that the common law right survives, and that a member might still insist upon the wages fixed by ancient custom; but it may be doubted how far the old liability would attach to the new constituencies created by successive Reform Acts. Lives of Chancellors, iii. 420.

[2] Stubbs, Const. Hist. iii. (5th ed.) 427.

sheriff, who might withhold the writ, sometimes arbitrarily, sometimes because a town had become depopulated or decayed.

Royal additions.

Large additions to the borough representation were made during the reign of Henry VIII and onwards until the reign of Charles II. Some towns were added by royal charter; some by statute; some petitioned for the revival of rights which had lain dormant for centuries. In the reign of James I there was a strong tendency to revive such ancient and forgotten rights of representation, and the House of Commons resolved on the 4th of May, 1624, 'that a borough cannot forfeit this liberty of sending burgesses by non-user.'

Changes of character.

It is impossible to doubt that, of the boroughs added by royal charter, many were added not because of their importance, or for the value of their voices in the deliberations of Parliament, but because from their smallness and lack of political interest they could be relied upon to return nominees of the Court. And in addition to the boroughs which were never intended to express a free opinion in politics, there were those which had once been thriving ports or seats of manufacturing industry, which had dwindled and decayed as wealth and commerce moved northwards, and had fallen under the influence of a great landowner or proprietor of boroughs; or again it happened sometimes that the nature of the franchise might be such as to deprive the representation even of a large and thriving town of any value in so far as it meant the expression of local opinion.

It would be easy to multiply illustrations of the smallness, the corruption, the non-representative character of the constituencies which existed before 1832. It is enough to say that it was alleged, and with apparent truth, at the end of the eighteenth century, that 306 members were virtually returned by the influence of 160 persons; it is certain that the Reform Bill of 1832 had to deal with nine boroughs in which the number of voters did not exceed fifteen.

Effect of reforms of 1832, 1867.

The Reform Act of 1832 and the Representation of the People Act of 1867 both tended to diminish or take away the representation of those places which had ceased to

express any local or mercantile or political interest, and to give members to those places which from their population or importance had acquired a fair claim to be represented in Parliament.

Changes of nineteenth century.

There is no great object to be gained by following in detail the transference of political power from landowners and boroughmongers to communities where numbers, interests, and wants called for representation. The following table will show the distribution of seats before and since the Reform Bill of 1832 :

	Before 1832.	1832.[1]	1867–8.[2]	1885.[3]	1918.[4]
England and Wales . .	513	500	495	495	528
Scotland . . .	45	53	60	72	74
Ireland	100	105	103	103	105
	658	658	658	670	707

Under the Government of Ireland Act, 1920,[5] the number of members to be returned by Northern Ireland constituencies to serve in the Parliament of the United Kingdom is to be 13, and the total membership of the House of Commons will thus be, in future, 615 instead of 707.

The Act of 1832 a disfranchising measure.

The Reform Act had to deal with a great number of constituencies which had ceased to represent anything but the caprice or ambition of a few individuals. It disfranchised in England alone 56 boroughs absolutely, and 31 to the extent of depriving each of one member. The seats thus taken from the rotten boroughs were given to counties and large towns, on the principle that the representation of the country in Parliament should not be the representation of numbers only, but of communities in which the population was numerous : indeed it was impossible that representation should be other than local, so long as the franchise in counties differed from the franchise in towns. And for this same reason, until the franchise was made uniform, a measure

[1] 2 & 3 Will. 4, cc. 45, 65, 88.
[2] 30 & 31 Vict. c. 102 ; 31 & 32 Vict. cc. 48, 49.
[3] 48 & 49 Vict. c. 23.
[4] 7 & 8 Geo. 5, cc. 64, 65.
[5] 10 & 11 Geo. 5, c. 67, s. 19, and Fifth Schedule. The members for Southern Ireland constituencies to serve in the Imperial Parliament were, under the Act, to have been 33 in number.

of redistribution was necessarily a measure of disfranchisement. Where a borough ceased to return members its electors did not merely cease to have a member to themselves; with the exception of those who might possess the county qualification, they ceased to be electors at all.

Later Acts disfranchise localities, not electors;

Later Redistribution Acts, though they have deprived many boroughs of their separate representation, have not by doing so disfranchised electors, though they may have altered the electors' constituencies and diminished the relevant importance of their votes.[1] Since the qualifications for the parliamentary franchise are now uniform in county and borough, the borough which ceases to return a member drops into the county constituency in which it is geographically situate; its electors become electors for that division of the county.

and are based on numbers.

The Redistribution Act of 1885 differed from its predecessors in that it departed to a great extent from the principle of local representation, and was professedly based on an attempt to divide the members, with a rough attempt at equality, among the population. The same policy has been followed in the Act of 1918. Before 1885 the average throughout the country of population to members was in counties 78,000, in boroughs 41,200, to a member. But this proportion was not preserved: for instance, 79 boroughs in England, with populations under 15,000, each returned a member, and 36 boroughs, with populations under 50,000, each returned two members.

Basis of calculation.

The Act of 1885, while retaining the representation of the Universities, and making some sacrifice of principle in favour of local representation, established as a basis of calculation the assignment of a member to every 54,000 of population. All towns with a population of less than 15,000 were thrown into their respective counties, whether or not they had previously returned members. Towns which had more than 15,000 inhabitants and less than 50,000 returned one member; those which had more than 50,000 and less than

[1] The Act of 1918 is, however, a disfranchising measure in a certain sense by reason of the restrictions which it placed on the right of plural voting: *ante*, p. 127.

165,000 returned two members; beyond this an additional member was given for every additional 50,000 of population; and the county representation was based in like manner upon numbers. The principles adopted in the Act of 1918 are substantially the same, with the variations rendered necessary by the growth of population. Generally speaking, a county or borough with a population of less than 50,000 has ceased to have separate representation; a municipal borough or urban district with a population of not less than 70,000 becomes a separate parliamentary borough; a county or borough returning two members does not lose a member if its population is not less than 120,000; and a member is given for a population of 70,000 and every multiple of 70,000, with an additional member for any remainder which is not less than 50,000. So far as possible the boundaries of parliamentary constituencies are made to coincide with the boundaries of administrative areas. In Ireland the standard unit of population for each member was fixed at 43,000, and only counties or boroughs with a population of less than 30,000 ceased to have separate representation [1]; but the Northern Ireland constituencies under the Government of Ireland Act, 1920, will be much larger.[2]

The Act of 1918.

The Redistribution Act of 1885 made a further change and departure from the traditions of our representative system; a change which followed not unnaturally from the attempt to apportion members to population throughout the country. Except in the cases of the Universities, of the City of London, and of towns which had hitherto combined the possession of two members with a population over a certain limit, the constituencies thenceforward returned one member apiece. This policy is continued by the Act of 1918, which, on the population basis explained above, has still further reduced the number entitled to return two

Single-member constituencies.

[1] Report of Mr. Speaker Lowther on the resolutions adopted by the Conference on Electoral Reform, 1917 (Cd. 8463), and Report of the Boundary Commissions for England and Wales, Scotland and Ireland, following Instructions based thereon and approved by the House of Commons on 18th June, 1917 (Cd. 8756, 8759, and 8830); 172 Com. Journ. 125: 94 Parl. Deb. 5th ser. 1462–95.

[2] See *ante*, p. 135.

members. The City of London, ten undivided boroughs in England and one in Scotland, the Universities of Oxford and Cambridge, and the grouped English Universities are still single constituencies with two members, and the grouped Scottish Universities are a single constituency with three; but save in these exceptional cases, in which the principle of the community has been preserved, we have now, in the words of Mr. Gladstone, spoken with reference to the Act of 1885,[1]—

'not absolutely as a uniform, but as a general and prevailing rule the system of what is known as one-member districts. The one-member district is, as far as England is concerned, almost a novelty, because in a system of representation which counts and reckons more than six centuries of life, what began at the Reform Bill[2] may be considered almost a novelty. The recommendations of this system are, I think, these—that it is very economical, it is very simple, and it goes a very long way towards what is roughly termed the representation of minorities.'

Representation of minorities.

It can hardly be said that in the elections which have taken place since 1885, the representation of minorities has been a conspicuous feature, and it is rather to the principle of proportional representation operating in large constituencies returning three or more members that reformers now look for the purpose of securing this object. Proportional representation is discussed later, and it is sufficient in this place to say that under the Representation of the People Act, 1918, the system has now been applied to elections in certain University constituencies.[3] The Act did indeed provide facilities for extending it on a wider scale to other constituencies, but the opportunity thus afforded for an interesting experiment was subsequently rejected by the House of Commons.[4]

[1] 294 Hansard, 3rd Series, p. 380. Debate of Dec. 1, 1884.

[2] This is not strictly accurate. Edward IV gave by charter the right of returning one member to Wenlock. The Welsh counties and county towns and the town of Monmouth each returned a member under 27 Henry 8, c. 26; so did Abingdon, Bewdley, Higham Ferrers, and Banbury, enfranchised, the first two by Mary, the last by James I.

[3] 7 & 8 Geo. 5, c. 64, s. 20 (1).

[4] See s. 20 (2), and 106 Parl. Deb. 5th ser. 63–118, debate of 13th May, 1918; 173 Com. Journ. 91.

§ 2. *Registration.*

Registration.

It is a condition precedent to the exercise of the right to vote that the voter should be upon the Register. This preliminary to the enjoyment of the franchise was first introduced when the franchise was remodelled in 1832, and the rules respecting it are now governed by the Representation of the People Act, 1918. As this book is not a manual of election law, it is unnecessary to go into the subject in detail. It is enough to describe the practice in outline for England, as settled by the Act of 1918.[1]

Duties of Registration Officer.

Two registers, the spring and autumn registers, are now prepared in each year for the 'qualifying periods'[2] which end on 15th January and 15th July respectively. These registers come into force on the 15th April and 15th October in each year and remain effective until the next succeeding register comes into force.[3] Each parliamentary borough and county is a registration area, and each area has a registration officer. In a parliamentary county coterminous with, or wholly contained in, one administrative county, the clerk of the county council is the registration officer; in a parliamentary borough coterminous with, or wholly contained in, one municipal borough, he is the town clerk of the borough. In all other cases the Secretary of State[4] selects the clerk of the county council or the town clerk, as the case may be, who is to be registration officer for the area.

Electors lists.

The registration officer compiles the register, which

[1] The subject is dealt with in Part II of, and the First Schedule to, the Act.

[2] *Ante*, p. 122.

[3] The various dates given in the text are the statutory dates prescribed by the Act; but 'during the continuance of the present war and a period of twelve months thereafter' they might be varied by Order in Council (s. 46), and this has in fact been done. An Order in Council under the Termination of the Present War (Definition) Act, 1918 (8 & 9 Geo. 5, c. 59) fixed the official termination of the war on August 31, 1921.

[4] S. 12 of the Act placed this duty on the Local Government Board, whose functions were transferred to the Ministry of Health by the Ministry of Health Act, 1919 (9 & 10 Geo. 5, c. 21). By the Ministry of Health (Registration and Elections, Transfer of Powers) Order, 1921 (S. R. & O. 959), made under s. 3 (3) of the latter Act, all the powers and duties of the Minister relating to elections and registration have now been transferred to the Secretary of State.

contains the names of those who are entitled to vote as parliamentary electors or as local government electors. A supplement to the register contains a separate list of persons entitled to vote as absent voters.[1] The registration officer in the first instance prepares electors lists of all persons who appear to him after sufficient inquiry to be entitled to be registered, and these lists are published on or before 1st February and 1st August respectively. The overseers of any parish which, or any part of which, forms a registration unit within the registration area may be required by the registration officer to make the necessary inquiries and to prepare the electors lists on his behalf.

Claims and objections.

After the electors lists are published, a person who claims to be entitled to be registered and who is either not entered or is incorrectly entered, may claim to be registered or to be registered correctly by sending to the registration officer a claim not later than 18th February or 18th August, and the lists of claimants are published by the registration officer not later than a week after those dates. Notice of objections to the registration of any person whose name appears in the electors lists must be sent to the registration officer not later than 15th February or 15th August, or, in the case of objections to persons whose names appear in the published list of claimants, not later than 7th March or 4th September. The claims and objections are then considered by the registration officer and claimants and objectors are given an opportunity of making good their case. An appeal lies to the county court from any decision of the registration officer on any claim or objection which has been considered by him, and there is a further appeal on a point of law from the county court to the Court of Appeal.

The Registers.

The registers themselves, after the necessary corrections have been made, are published not later than 15th April and 15th October in each year, and, as already stated, come into force on those dates.

[1] i.e. naval and military voters (see p. 125), with certain exceptions, and electors who satisfy the registration officer that there is a probability that by reason of the nature of their occupation, service or employment, they will be debarred from voting at a poll at elections held while the register is in force: see *post*, p. 145.

In the case of University constituencies, the governing body of the University prepares the register and is entitled to charge a fee, not exceeding £1, in respect of the registration of any person entitled to be registered. In other constituencies, all expenses properly incurred by Registration Officers in the performance of their duties in relation to registration are a charge upon the local rates, but a contribution equal to half the expenses so paid is made from the Exchequer.

It will be seen that a claim to be registered is no longer an essential preliminary to registration, as (save in the case of the occupier) it was under the former law. Only the person who desires to be placed upon the absent voters list has to make a special claim for the purpose.[1] A statutory duty is now laid upon the Registration Officer to secure the inclusion in the register of all persons entitled to be registered, though of course any person who has been accidentally omitted may still claim to have his name inserted. Secondly, it is important to notice that there are now two registers prepared in each year, instead of one, as heretofore. This is an essential corollary of a six months' qualifying period, but substantially increases the expense of registration; and hence we see that the State now pays part of the cost.

Conclusiveness of Register.

A man who desires to vote in a parliamentary constituency must first obtain one of the qualifications which have already been described. If he does so, he will be duly placed upon the register. But he may be subject to disqualifications which, if they had been known to the Registration Officer, would have disentitled him to be placed upon the register; and it has been questioned how far the evidence furnished by the Register is conclusive not only upon the returning officer who receives the votes, but upon the Court which may have to inquire into the validity of elections.

35 & 36 Vict. c. 33, s. 7.

The question turns on the construction of s. 7 of the Ballot Act, which enacts that no one shall be entitled to

[1] Naval and military voters are placed upon the absent voters list without claim, unless they give notice to the contrary, or are registered, in pursuance of a claim for the purpose, for the constituency in which they have an actual residence qualification.

vote whose name is not on the Register; that every one shall be entitled whose name is on the Register, but that 'nothing in this section shall entitle any person to vote who is prohibited from voting by any statute or by the common law of Parliament'.[1]

And this exception to the conclusiveness of the Register has been interpreted as not referring to 'persons who from failure in the incidents or elements of the franchise could be successfully objected to on the revision of the Register: it means persons who from some inherent or for the time irremovable quality in themselves have not, either by prohibition of statute or of common law, the status of parliamentary electors'.[2]

The votes of such persons might be rejected by the returning officer, or if accepted by him might be struck off at a scrutiny upon an election petition.

Thus an undergraduate of full age who, in default of objection, was placed on the Register of parliamentary voters for the City of Oxford in virtue of his residence in college rooms, would be entitled to vote. Not so an infant undergraduate in a like position.

§ 3. *Mode of Election.*

Effect of the Ballot Act.

The process by which an election is made has been described, in its preliminary stages, in an earlier chapter. It has been described up to the point at which the returning officer[3] receives the writ directing him to procure an election. As the process of election is now governed

[1] S. 9 (3) of the Representation of the People Act, 1918, is in substantially the same terms, and provides that nothing in the Act shall confer a right to vote on any person who is subject to any legal incapacity to vote.

[2] *Stowe* v. *Jolliffe*, L. R. 9 C. P. 734.

[3] The returning officer is the sheriff, mayor, or chairman of the urban district council, according as the constituency is in a county, borough or urban district; and where the constituency extends to more than one administrative area, such sheriff, mayor or chairman as the Secretary of State may designate. In all cases the actual duties are performed by the registration officer as acting returning officer, and he may appoint deputies. In University constituencies, the returning officer is the Vice-Chancellor or other similar official. In the grouped English Universities, the Board of Education select one of the heads of the Universities composing the group; in the grouped Scottish Universities, the Vice-Chancellor of Edinburgh acts.

by the Ballot Act of 1872, it is worth noting that the changes effected by that Act, apart from details of procedure, relate to the publicity (1) of the nomination, (2) of the poll. Until that date the nomination took place at a hustings. The candidates were proposed and seconded in commendatory speeches, addressed for the most part to a casual crowd, chiefly composed of persons who were not entitled to vote. The candidates explained their political views, and, if the election was contested, a show of hands was demanded by the returning officer. Whatever the result of the show of hands it had no effect on the election. A poll was demanded on behalf of that candidate for whom fewest hands were held up, and on the days and at the place fixed for the poll the voters announced publicly the name of the candidate for whom they desired to vote. The disorders of the nomination and the possible intimidation of voters who voted openly were the evils which the Ballot Act was designed to remedy.

Rules of Election.

The present provisions of the law with respect to the conduct of an election depend upon the Parliamentary and Municipal Elections Act, better known as the Ballot Act, of 1872.[1] The returning officer, upon the receipt of the writ (of which a form was set out on page 59), must give notice of the day and place of election, and of the poll if the election is contested. The Representation of the People Act, 1918, now requires all elections at a general election to be held on the same day and to ensure this provides that the day to be fixed by the returning officer for the election shall be the eighth day after the date of the Proclamation summoning a new Parliament. In the case of a bye-election, the election must take place, in a county within nine days, in a borough within seven days, after the receipt of the writ.

The nomination.

The candidates have to be nominated on the day fixed for the election. The nomination is made in writing, each

[1] 35 & 36 Vict. c. 33. This Act, which had since 1872 been re-enacted annually, was made permanent by the Representation of the People Act, 1918, s. 35. The latter Act amends the Ballot Act in certain respects, and it has been further amended by the Representation of the People (No. 2) Act, 1920 (10 & 11 Geo. 5, c. 35) s. 3.

candidate being proposed and seconded by a registered elector for the constituency; the names of eight other registered electors must be affixed to the nomination paper as assenting to the nomination.[1]

The poll.

If within an hour of the time fixed for the election no more candidates are nominated than there are vacancies, the election is then made and the names returned to the Crown office in Chancery. If there is a contest the election is adjourned to a polling day. In the case of a general election, the polling day in all constituencies is the same—the ninth day after the day of election, which, as we have seen, has to be the eighth day after the Proclamation summoning the Parliament. In the case of a by-election, the poll must be fixed by the returning officer not less than six nor more than eight clear days after the day fixed for the election.

Polling places are to be fixed conveniently as to number and situation by the local authorities, and the poll is to commence at eight in the morning, and conclude at eight in the afternoon but may, if any of the candidates so wishes, commence at seven and conclude at nine.[2] During these hours the voter, qualified and registered as above described, can deliver his vote at the polling place of his district by ballot. A paper is delivered to him containing the names of the candidates, and he places a mark, which he is able to do in secret, against the name or names of those for whom he desires to vote. The paper is placed in a box; at the conclusion of the poll the polling boxes are sent to the returning officer at the place of election, the votes are counted, and the poll declared. The writ is then endorsed by the returning officer with a certificate in the following form:—

I hereby certify, that the members (*or* member) elected for —— in pursuance of the within-written writ, are (*or* is) A. B. of —— in the county of —— and C. D. of —— in the county of ——

(Signed) X. Y.

[1] To prevent frivolous candidatures, each candidate is required to make a deposit of £150, which is forfeited to the Crown if he fails to secure one eighth of the total votes polled.

[2] Elections (Hours of Poll) Act, 1885 (48 & 49 Vict. c. 10), as amended by the Extension of Polling Hours Act, 1913 (3 & 4 Geo. 5, c. 6).

The writ thus endorsed is returned to the clerk of the Crown in Chancery.

Absent voters and proxy voting.

The Act of 1918 introduced two important novelties in the manner of voting at elections. An elector may now in certain circumstances send in his ballot paper by post or may vote by proxy.[1] He may do the first if he is on the absent voters list[2] and has an address in the United Kingdom recorded on the list. He may do the second if his name is on the absent voters list and he has satisfied the registration officer that he will probably be at the time of a parliamentary election at sea or out of the United Kingdom. He appoints a proxy for the purpose, and a proxy paper, unless cancelled, remains in force so long as the elector continues to be registered in respect of the same qualification and to be on the absent voters list. No person can be appointed as a proxy unless the wife, husband, parent, brother or sister of the elector, or unless he is registered as an elector for a constituency in which the elector for whom he acts as proxy is himself registered; and no person can vote as a proxy on behalf of more than two absent voters in a constituency, unless he is voting as one of the relatives above mentioned of the absent voter.

University elections.

In University constituencies the Ballot Act does not apply. The Act of 1918 contains special provisions with regard to the conduct of University elections,[3] the procedure in Scotland being slightly different from that in University constituencies elsewhere. In Scotland the voting is by means of voting papers furnished by the registrar of each

[1] 7 & 8 Geo. 5, c. 64, s. 23, as amended by the Representation of the People (No. 2) Act, 1920 (10 & 11 Geo. 5, c. 35), s. 2. Under the Act of 1918, the right to send in ballot papers by post was not limited to persons in the United Kingdom, and during the continuance of the war and twelve months thereafter, eight days (afterwards extended to eleven) were to be allowed after the polling day during which such ballot papers might still be received The right to vote by proxy was also limited to naval and military voters serving abroad in places specified by Order in Council, and to seamen. These provisions were repealed by 10 & 11 Geo. 5, c. 35, and the law is now as stated in the text.

[2] *Ante*, p. 140.

[3] 7 & 8 Geo. 5, c. 64, s. 36 (1) and Fifth Schedule. The poll in the case of a University election lasts for five days, or, in Scotland, not less than four nor more than six days.

University and returned to him through the post ; elsewhere University electors vote by the delivery of a voting paper, or (unless the returning officer directs to the contrary) in person, or by sending a voting paper to the returning officer by post.

The expenses of the returning officer at a parliamentary election (other than a University election) are now a charge upon the Consolidated Fund.[1]

§ 4. *Representation of Minorities and Proportional Representation.*

It is impossible to pass over the question of the representation of minorities because it has affected in the past, and may affect in the future, the questions of the franchise and the distribution of seats. It is, however, a question of practical politics quite as much as of constitutional law, and an endeavour will be made to state shortly and without controversial comment the facts relating to the subject.

Representation of estates,

Our Parliament was in its origin a representation of estates : the clergy, the baronage, the commons. The commons were alike representative of shire and town, and the representation was that of the sum of the local interests, which the knights of each shire, and the burgesses of each borough, were bound to promote. Changes in the centres of commerce and industry and the consequent growth and shifting of the population brought with them the need for an extension of the franchise and a redistribution of political power ; but they brought with them also a change in the conception of the character of our representation. Greater ease of communication and wider and quicker diffusion of intelligence have tended to efface the distinction of localities ; classes and the interests of classes call now to be represented. The wide extension of the franchise gives ground for anxiety lest some of the interests, and most of the intelligence of

of localities,

of classes.

[1] Representation of the People (Returning Officers Expenses) Act, 1919 (9 Geo. 5, c. 8). Under the Act of 1918 (s. 29 (2)) these expenses were to be met by a parliamentary vote, and the House of Commons by refusing to vote the necessary funds would thus have been enabled to put difficulties in the way of a dissolution by the Crown on the advice of ministers : see 112 Parl. Deb. (H of C.), 5th ser. 1334.

the community, should be ignored and buried under the mass of votes recorded by electors who go to the poll to support candidates of whom they know nothing or little except that they are chosen by the organization of the party.

The single-member constituency.

Each of our constituencies, for the most part, can only choose one man to represent it, and the multitude of voters needs some guidance and organization lest a result should be produced which was unsatisfactory to the great majority. But organization may reach a point in which all freedom and variety of thought is extinguished in the requirement of adherence to a programme of doctrines or of fidelity to an individual. The elector may find that he must vote for a man from whom he differs on many points, on pain of being represented by one from whom he differs on many more. Some means exist, others have been tried, and others again merely suggested, by which the voice of the minority may be ensured a hearing.

Fancy franchises

Several of the reform bills of the last century contained provisions which would give additional voting power to the educated or the thrifty man. Lord John Russell's bill of 1854, for instance, proposed to confer the franchise on any person who enjoyed a salary of £100 a year or an income of £10 from Government stock; who paid 40s. income tax, possessed a deposit of £60 in the savings bank, or was a graduate of any university.[1]

No one of these proposals found its way to the Statute Book, and indeed some of them are open to obvious objection from their fluctuating character and from the risk that they might be created for the purpose of an election.

The business premises qualification.

The right to a vote in respect of a business premises qualification in addition to that in respect of a residence qualification increases the voter's electoral power by allowing him a voice at elections in a locality where he may be presumed to possess material interests arising from the exercise of a trade or profession.

University representation.

University representation offers some security that the higher education should have some one to support its interests in the House of Commons.

[1] Spencer Walpole, Hist. of Twenty-Five Years, i. 186.

These forms of franchise may be matters of controversy. It is enough to call attention to the fact that they secure, to some extent, the representation of interests which might otherwise be unheard or silenced.

Three-cornered constituencies.

The 'three-cornered constituency' which existed from 1867 to 1885 was an institution designed not so much to secure hearing for various views and interests as to diminish the power of the majority.

In some large constituencies returning three or four members each voter had one vote less than there were seats to fill. The result of this was the return of one member representing the minority, unless the majority was so large and so well drilled as to have enough votes, and enough organization in the use of them, to be able to win all the seats.

A plan of this sort, limited to a few large constituencies, did nothing to secure variety of representative character: it did no more than make the ordinary minority a little larger, and the ordinary majority a little smaller.

A different method in process and in conception was that known as the 'cumulative vote', a method used in school board elections, while school boards existed, between 1870 and 1903. Every voter had as many votes as there were candidates, and might give them all to one candidate, or dispose them among the candidates as he pleased. This procedure would enable a group of voters to obtain the representation of a special line of thought or policy if they desired it and were prepared to combine for the purpose.

The cumulative vote.

The object of the cumulative vote, in so far as it is based on the desire to secure expression for opinions, perhaps of political importance, which may not be the opinions of the majority in any assignable locality, is more fully carried out by the adoption of what was known as Mr. Hare's scheme, and by the abolition of local constituencies altogether.

Self-made constituencies.

By this process the number of voters would be divided by the number of seats, and any person would be elected who obtained a number of votes equal to the result of the division. The voter would arrange several candidates in the order of his choice, and his vote would be assigned to

the candidate who stood highest on his list, whose number was not yet full. One advantage of the scheme would be that a voter would be less liable to the risk of his vote being thrown away. For it may well happen, under our present system, that a man may be in a permanent minority in the constituency of which he forms a part. Another advantage would be found in the better chance of recognition of exceptional individual merit or of special interests or opinions. But, as Mr. Bagehot very forcibly pointed out, the scheme, in so far as its machinery did not fall, as it probably would fall, into the hands of party organizers, would give expression only to extreme opinions whose adherents could muster perhaps one or two constituencies. For the bulk of the voters would be driven by party managers into one of the two party camps because their gradations of opinion would not be so strongly marked, nor their desire to enforce them so keen as to induce them to construct a variety of constituencies, each just off the strict party lines. Where such lines were departed from, the departure would be brought about by the votaries of an impracticable ideal, or by the admirers of the fashionable hero of the hour, and a few fanatics and athletes would enliven an otherwise commonplace assembly.

Proportional representation.

The modification of Mr. Hare's scheme, known as proportional representation, is that which has found most favour in this country, and of late years has been adopted by the Legislature in a number of cases.[1] Education authorities in Scotland,[2] and local authorities in Ireland,[3] are now elected according to the principle of proportional representation. The Government of Ireland Act, 1920,[4] made similar provision with regard to the Irish Parliaments. But the Imperial Parliament itself has shown more reluctance in extending the system to its own body. Elections in

[1] The earliest example of the official use of the system appears to be the Regulations issued by the Insurance Commissioners in 1913 and 1914 with reference to the election of insurance committees under the National Insurance Act, 1911 : see S. R. and O. 1913, No. 1224, and 1914, No. 160.

[2] Education (Scotland) Act, 1918 (8 & 9 Geo. 5, c. 48), s. 23.

[3] Local Government (Ireland) Act, 1919 (9 & 10 Geo. 5, c. 19), s. 1.

[4] 10 & 11 Geo. 5, c. 67, s. 14 (3). The Government of Ireland Act, 1914 (4 & 5 Geo. 5, c. 90), s. 8 (3), also provided for proportional representation.

University constituencies where there are two or more members to be elected are under the Representation of the People Act, 1918,[1] to be conducted on the proportional representation principle; and it was further provided by the same Act that Commissioners should be appointed to prepare a scheme under which as nearly as possible one hundred members might be elected at a general election in the same manner for constituencies in Great Britain returning three or more members. But the scheme was not to come into effect until approved by both Houses of Parliament, and it failed to obtain such approval in the House of Commons.[2] The division of opinion on the subject does not follow party lines, and it appears unlikely, until one of the great parties has made it part of its programme, that its application will be further extended to parliamentary elections. The supporters of the principle, however, continue their advocacy with unabated enthusiasm, and it remains a living issue in the politics of to-day.

Changes involved in the system.

The system involves two important changes. The first is the abolition of the single-member constituency, and the substitution of larger constituencies, numerically equal, and each returning not less than three, but preferably five or six or even more, candidates. The second is the transferable vote. The voter has before him the list of candidates and numbers them in the order of his choice. A simple calculation shows the number of votes necessary for an election, and such candidates as secure on the first scrutiny the necessary number, as being the first choice of the necessary number of voters, are elected at once. Next come those who were the first or second choice of the largest number of voters, and in the end the five or six members whom the constituency was entitled to elect would be chosen. The voter may feel some assurance that if the candidate of his first choice did not need his support, or was so unacceptable as to be ruled out at the beginning, his second, or other choices, will profit by his vote. He will never be in the position of the man whose vote is wasted in a vast majority or a hopeless minority; or who

[1] 7 & 8 Geo. 5, c. 64, s. 20.

[2] Debate of 13th May, 1918; 106 Parl. Deb. (H. of C.), 5th ser. 63.

oscillates from side to side because no candidate, as may happen under our present system, satisfies his political opinion.

Its complexity exaggerated.

Proportional representation has been criticized on the ground of its difficulty and complication. So far as the voter himself is concerned, it is no less simple than the present system; such difficulties as it may possess relate to the subsequent counting of the votes, which is a matter exclusively for the returning officer and his assistants. It is reported to have worked quite smoothly in the elections in Scotland and Ireland where it has been tried.[1]

We cannot hope for a Parliament which should mirror every phase of political feeling, and if we could attain to such an ideal we should meet with disappointment, because in an assembly where no proposition could be accepted without abundant qualification it would be difficult to arrive at any conclusions worth reaching. But this system gives an excellent chance for the representation in every constituency of such varieties of opinion as had a substantial following.

Effect of present system,

The practical form which the difficulty assumes under our existing system, may be tentatively stated thus:—The single-member constituencies may produce a variety of representation, but must needs do so by accident; they can only do so when the ward or division of town or county happens to contain a majority of voters of a special class or character. In the great majority of such constituencies candidates are chosen on strictly party lines; and since large bodies of men have some difficulty in coming to conclusions, the candidates of each side are selected by the really eager or extreme representatives of each party in the division.

in limiting choice

The electors of such a constituency can only vote for one candidate. They must choose between two, and each one of the two may be the nominee of the most zealous and

[1] The Order in Council (S.R. & O. 1918, No. 1348) made under the Act of 1918, which prescribes the method of conducting University elections, shows clearly by means of illustrative examples how the system operates. An account by Mr. J. F. Williams, K.C., of the growth of the system in foreign countries, with a bibliography, will be found in the Journal of Comparative Legislation for January 1921.

uncompromising members of the two political parties. It is very possible that to a great many electors the two candidates are alike distasteful. Men of independent judgment may not care to vote for a candidate whose chief recommendation is that under no circumstances will he withdraw his support from a given statesman, the leader of his party ; or that he accepts with implicit faith a set of dogmas or a scheme of proposed legislation drawn up by active party managers. Yet if they do not vote for such a candidate they must vote for his opponent, whose opinions may be yet more distasteful to them, or else they must cease to exercise the privileges of an elector. The advent of a third candidate, usually from outside the two great political parties, tends rather to confuse the issue than to increase freedom of choice.

Summary. It is not desirable that politics should fall entirely into the hands of party organizers, as may not impossibly happen under our system of single-member constituencies ; nor is it well that the voter's choice should be limited to an alternative of political extremes. The question resolves itself into a choice of risks—the risk lest party discipline, which in a large deliberative assembly is practically necessary for the transaction of business, should be too far relaxed by the representation of opinions on a graduated scale ; and the risk lest party organization, drawn too close, should exclude from political life practical men who do not care to see opinions pushed to their logical results, and independent men who like sometimes to make up their own minds on the questions of the hour.

Section IV

Privileges of the House of Commons

Difficulties of the subject.

The privileges of the House of Commons exist chiefly for the maintenance of the dignity and the independence of that House. The rules of which they consist are not readily ascertainable, for they only obtain legal definition when they are cast in statutory form, or when a conflict between the House and the Courts has resulted in some question of privilege being settled by judicial decision.

Statute law and judicial decision in dealing with this subject are almost entirely concerned with the limitation of the prerogatives of the Crown in favour of the House of Commons, and the limitation of the privileges of the House of Commons in favour of the Courts, and of private rights.

The Parliament Act has now to a great extent defined, and has materially enlarged the privileges of the House of Commons in respect of finance; but this is a matter which concerns the relations of the two Houses, though the public is affected indirectly by the increase in the political power thus acquired by the House of Commons and by the Government of the day. The topic must be referred to in a later chapter. This section deals with the relations of the privileges of the House of Commons to the King, the Courts, and the public.

Officers and procedure.

First, in order to simplify what follows, it is necessary to state that the House possesses certain officers for the general conduct of its business; that through these officers its privileges are enforced, and enforced by process of which the course has been discussed, and the validity admitted by Courts of Law.

Privileges demanded.

Next, we come to the privileges themselves. Of these, some are specifically asserted and demanded of the Crown at the commencement of every Parliament. Three deal more especially with the relations of the House and the Crown—the privileges of free speech, of access to the Crown, and of having the most favourable construction put upon

all their proceedings. One deals with the relations between the members of the House and other subjects of the realm—the privilege of freedom from arrest.

Privileges not demanded.

But there are other privileges not specifically mentioned on this occasion, though regularly asserted and enforced by the House. These are, the right to provide for the due constitution of its own body, the right to regulate its own proceedings, and the right to enforce its privileges by fine or imprisonment, or, in the case of its own members, by expulsion.

Disputes between House and Courts.

Lastly, we come to the questions of dispute which have arisen between the House and the Courts, and in some of these it would seem that the House has begun with a misconception of the limitations on its undoubted privileges, and has then endeavoured to cure its error by an arbitrary assertion of exclusive right to define its privilege; in other words, to assume to itself what privileges it pleased.

Thus the House has disputed the legality of a legal act, as in *Ashby* v. *White*,[1] and treated such an act as a contempt; or has endeavoured to legalize an illegal act, as in *Stockdale* v. *Hansard*.[2] When the right to do these things has been disputed, the House has tried to settle the question off-hand by a resolution that privilege covers the case, and that no Court has jurisdiction to discuss the legality of anything which its vote has ordered.

This is the issue on which the conflict has turned between the House and the Courts. It is safe to say that the Courts have won the day.

Rules as to commitment.

The only other question of importance is comparatively technical. It relates to the power possessed by the House to commit for contempt, without assigning any other cause, or any cause at all, in the warrant of commitment, or in the return to a writ of *habeas corpus*.

§ 1. *Officers of the House, and procedure for Contempt.*

A consideration of the privileges of the House of Commons needs some preliminary words as to the position and duties of the Speaker, by whom these privileges are claimed and

[1] 2 Lord Raymond, 938. [2] 9 A. & E. 1.

through whom they are enforced; and as to the machinery which the House possesses for recording its proceedings and for putting its privileges into effect.

The Speaker.

The history of the office of Speaker has been written elsewhere,[1] and needs but a brief notice here. It is plain that the Commons must from the time that they sat apart from the Lords have needed a spokesman to be their medium of communication with the Crown. At any rate, from 1377 there is an unbroken succession of Speakers, described in those days as 'prolocutor', 'pourparlour', or 'parlour et procuratour'. Inasmuch as the Speaker was chosen quite as much for these purposes of communication as for the maintenance of order within the House, the Crown claimed and exercised a virtual right of selection, and the Speaker was quite as much the mouthpiece of the Sovereign as of the Commons.

His relations with the Crown,

A conflict, conducted with a good deal of spirit on both sides, arose between Charles II and the newly elected House of Commons of 1679 on the right to choose the Speaker. The King declined to accept Sir Edward Seymour whom the Commons had chosen and who presented himself for the confirmation of his appointment; the Chancellor desired the Commons to go back and choose some one else, and on returning to their House they were informed whom the King wished them to choose. They declined to accept the royal nominee, and after a conflict of some days' duration a compromise was arrived at, Seymour was passed over, and a Speaker presented who was the independent choice of the Commons. From this time forth the right of the Commons to choose their own Speaker was not contested by the Crown, but for many years after, the Speaker habitually held a government office. Speaker Onslow[2] gave up the office which he held nearly midway through his tenure of the Speakership, in 1742, and thenceforth the practice was discontinued.

The Speaker, however, remained an active party politician. Addington left the Chair to become Prime Minister.

[1] Porritt, The Unreformed House of Commons, vol. i, chaps. xxi, xxii

[2] Onslow was Speaker from 1727 to 1761.

Abbot spoke in Committee on controversial measures, and took the opportunity, on presenting the Appropriation Bill at the bar of the House of Lords in 1813, to review the work of the session and to deliver an impassioned harangue against Roman Catholic emancipation. Abbot's conduct was the subject of severe criticism in the House; and his successor, Manners Sutton, when he intervened in debate, did so with some apology for his action. But Manners Sutton, though admittedly an excellent Speaker, was an active politician outside the House; and the Commons by rejecting him at the commencement of the Parliament of 1835 made it plain that they desired to see the Speakership dissociated from party politics. This principle has been uniformly adopted by the lengthening line of distinguished men who have occupied the Chair since Mr. Shaw Lefevre was chosen Speaker in 1839.

His election;

The forms of election have varied little since they were virtually settled early in the fifteenth century. For more than a hundred years the Speaker-elect in presenting himself for the approval of the Crown has ceased to ask that some worthier choice than himself should be made; and in the demand of privileges some other changes of no great moment have taken place.

his precedence;

The office is one of high dignity, and by an Order in Council of May 30, 1919, ranks next after that of the Lord President of the Council.[1]

his duties—(1) as spokesman,

The duties of the Speaker are threefold. He is, firstly, the spokesman and representative of the House; as such he demands its privileges, communicates its resolutions, its thanks, its censures, its admonitions. He issues warrants by order of the House for the commitment of offenders against its privileges, for the issue of writs to fill vacancies among its members, for the attendance of witnesses, or the bringing of offenders to the bar for rebuke or sentence. The symbol of his office is the mace which is laid before him on the table when he is in the Chair, and which, borne

[1] The order of precedence now is—Archbishop of Canterbury, Lord Chancellor, Archbishop of York, Prime Minister, Lord Chancellor of Ireland, Lord President, Speaker. Until 1919 the Speaker by an Act of 1689 had precedence next after the peers of the realm; hence the title 'First Commoner'.

by the Serjeant-at-arms, accompanies him wherever he goes in his capacity of Speaker.

(2) under 1 & 2 Geo. 5, c. 13.

Secondly, the Speaker is required under the provisions of the Parliament Act to discharge duties of a judicial or interpretative character.

Money Bills.

Under section 1 (2) of the Act he has to decide when a public Bill is a Money Bill, that is, a bill which contains 'only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation or repeal of such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them'.

The words 'taxation', 'public money', and 'loan' do not include taxation, money, or loan raised by local authorities for local purposes, and the duties of the Speaker are confined to the interpretation of Bills relating to imperial finance; but their importance is great.

A decision of the Speaker that a Bill contained matter which brought it outside the definition of a Money Bill would at the same time bring it outside the range of the drastic procedure which the Act provides for Money Bills.

Speaker's certificate.

Having come to the conclusion that the Bill is a Money Bill within the meaning of the subsection, the Speaker is required to endorse upon the Bill when it goes up to the House of Lords, and again when it is presented to the King for his assent, a certificate that the Bill is a Money Bill, and before giving the certificate he must consult, if practicable, two members to be appointed at the beginning of each Session from the Chairmen's Panel by the Committee of Selection.[1]

[1] The Committee of Selection, a body of eleven members chosen by the House at the commencement of each Session, appoints the Chairmen and Committees for private bills, nominates members of standing Committees, and a chairman's panel for these Committees. This should be distinguished from the Speaker's panel of members who may take the chair

Importance of his decision.

The decision of the Speaker on a question of this nature may be of great political importance to the Government of the day, for a Money Bill can be presented for the Royal Assent within one month after it has been sent up to the House of Lords, whereas if the Speaker hold that it is not a Money Bill, the Lords might delay it for two years from the date of its second reading in the House of Commons. The Speaker, therefore, is not merely called upon to assert, as heretofore, the privileges of the Commons, he is required to interpret an Act which limits the privileges of the Lords. And since his interpretation, if unfavourable to the contention of Ministers, might upset their scheme of legislation for the Session, the risk of bringing the Speaker's office into the region of party politics cannot be ignored.[1]

Other Public Bills.

Under section 2 (3) of the Act when a Bill which had been passed by the House of Commons and rejected by the House of Lords in each of three successive sessions is presented for the Royal Assent, the Speaker gives a certificate that the requirements of the section have been complied with, and certificates as to the identity of the Bill, when amendments are made on which both Houses have agreed, or which are formally necessary owing to lapse of time.

(3) as chairman.

Thirdly, the Speaker is the chairman of the House, and in that capacity he maintains order in its debates, decides such questions as may arise upon points of order, puts the question, and declares the determination of the House.

The Chairman of Committees

But the Speaker does not act as chairman when the House goes into Committee. The Chair is then taken by the Chairman of Ways and Means, who is chosen at the commencement of each Parliament for the purposes of the Committees of Supply and Ways and Means. He is appointed by the leader of the House moving 'that Mr. —— take the Chair'. A deputy-chairman is appointed in like manner. The chairmanship of other committees of the whole House is provided for by a panel of five, chosen for that purpose

and Deputy-Chairman.

in Committee of the whole House, at the request of the Chairman of Committees. Standing Orders, 48, 49, 1 (9).

[1] This is recognized in Lord Bryce's Report of the Second Chamber Conference: 1918, Cd. 9038, p. 14; and see *post*, pp. 250, 308.

by the Speaker, who act as temporary chairmen when requested so to do by the Chairman of Ways and Means.

The Chairmanship of Ways and Means is a strictly party appointment, and changes with every change of government. So does the office of deputy-chairman. It is to the credit of our public life that the rulings of these officers, who are constantly confronted with difficult points of order and of construction, are accepted by their opponents with the assumption that the chairman at any rate desires to be impartial.

Difficulties have arisen for want of provision for supplying the place of the Speaker if he should be temporarily disabled by illness or accident from discharging his duties. But these are now met by Standing Orders of the House, passed with the approval of the Crown. If the Speaker is unavoidably absent the clerk informs the House, and the Chairman, or in his absence the Deputy-Chairman, of Ways and Means performs the duties and exercises the authority of the Speaker;[1] and during the daily sittings of the House, which are now continuous throughout their duration, the chairman or deputy-chairman may temporarily take the place of the Speaker when requested to do so by him,[2] while the Deputy Speaker Act, 1855,[3] provides for the validity of acts required by law to be done by the Speaker, but done on such occasions by the Deputy-Speaker.

Deputy Speaker.

The Speaker is appointed afresh at the commencement of every Parliament. It is rare that the appointment should be made the subject of a party division; but, as a matter of fact, whenever the office falls vacant during the existence of a Parliament, the new Speaker is the nominee of the party which possesses for the time a majority in the House. The Government of the day take steps to ascertain whose name is likely to be most acceptable to the House, but the choice is that of the House itself, and is always made on the motion of a private member.[4] When a new Parliament meets, the House of Commons, after being summoned to the

Speaker's continuity of office.

[1] Standing Orders, 81. [2] Ibid. 1 (9). [3] 18 & 19 Vict. c. 84.

[4] Parl. Deb. 5th ser. 317; speech of the Leader of the House (Mr. A. Chamberlain) at the election of Mr. Speaker Whitley on 27th April, 1921.

bar of the House of Lords, is desired by the Lord Chancellor, on behalf of the Crown, to choose a Speaker. If a vacancy in the Chair should occur while Parliament is sitting, a minister of the Crown who is a member of the House of Commons acquaints the House of the King's desire that they should choose a Speaker. Either party is capable of producing men qualified beyond reproach to fulfil the duties of the Chair, and the Speaker of the last Parliament has been accepted by the next without opposition since 1835. The need of impartiality created by the judicial duties of a chairman makes the House shrink from investing the Speakership with the character of a party appointment.

The Speaker, the great officer of the House, may change as Parliaments change: he may lose his seat in the House at a general election, or be rejected as Speaker by the majority of a new Parliament. But under him there are subordinate offices which are not affected by dissolution of Parliament.

The holders of these permanent offices are the Clerk of the House and his assistants, the Serjeant-at-arms and his deputies, and the Chaplain.

The Clerk of the House.

The Clerk of the House of Commons has for his principal duty the record of the proceedings of the House. The Crown appoints him by letters patent under the Great Seal: he is technically styled 'Under-clerk of the Parliaments to attend upon the Commons', as distinguished from the Clerk of the House of Lords, whose proper title is 'Clerk of the Parliaments'. He signs all orders of the House, endorses the bills sent or returned to the Lords, and reads whatever is required to be read in the House. But his chief duty is to enter the proceedings of the House, and from these to prepare the journals, of the nature of which there will be more to say later on.[1] He has two assistants, clerks appointed by the Crown on the nomination of the Speaker, and removable only upon an address of the House.[2]

The Serjeant-at-arms.

The Serjeant-at-arms enforces the orders, as the Clerk records the proceedings, of the House. He too is appointed by

[1] *Post*, pp. 172–177.

[2] 19 & 20 Vict. c. 1.

letters patent under the Great Seal. He is the attendant of the Speaker when Parliament is sitting; when it is not sitting he may be called upon 'to attend his Majesty's person.'

Inside the House his duties are to attend the Speaker entering and leaving the House, to keep order in its precincts, to bring to the bar of the House persons who are summoned to attend there, or to introduce to the bar persons who are entitled to make communications to the House.

Outside the House he is charged with the execution of warrants issued by the Speaker in pursuance of an order of the House for bringing persons in his custody to the bar, for retaining them in his charge, or committing them to such place of detention as the House may order[1].

Process for enforcement of privilege.

The process by which the House enforces its privileges is by order to attend at the bar, or by order for the Speaker to issue a warrant for bringing the person summoned in custody of the Serjeant, or by a like order for warrant of commitment for contempt. The powers of the House in this respect were described by Parke B. in *Howard* v. *Gosset*[2]:

Powers of House.

'The House has power to institute inquiries and to order the attendance of witnesses, and, in case of disobedience (whether it has not even without disobedience we need not inquire), to bring them in custody to the bar for the purpose of examination. And, secondly, if there be a charge of contempt and breach of privilege, and an order for the person charged to attend and answer it, and a wilful disobedience of that order, the House has undoubtedly the power to cause the person charged to be taken into custody and to be brought to the bar to answer the charge: and further, the House, and that alone, is the proper judge when these powers or either of them are to be exercised.'

And, in construing warrants issued in virtue of these powers of the House, the rule was held to apply 'that nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears to be so.'

The powers here referred to will require further discussion and illustration, but this brief statement of their character

[1] For the officers of the House, see May, Parl. Practice (12th ed.), ch. vii.

[2] 10 Q.B. 451.

and the mode of their exercise may make it easier to understand the intervening matter which has next to be discussed.

§ 2. *Privileges of the House demanded by the Speaker.*

The claim of Privilege:

The privileges of the House of Commons are claimed at the commencement of every Parliament by the Speaker addressing the Lord Chancellor on behalf of the Commons. They are claimed as 'ancient and undoubted,' and are, through the Chancellor, 'most readily granted and confirmed' by the Crown.

The practice of claiming these privileges was of gradual growth. At first the Speaker claimed privileges for himself only [1], and as early as the reign of Henry IV demanded in general terms that he might be allowed to inform the King of the mind of the Commons, and that if he made any error in his communication he might have leave to correct himself by reference to the House.

its history.

In 1536 there is a definite demand of access to the Crown, in 1541 comes the demand for freedom of speech, and in 1554 for freedom from arrest, together with freedom of speech and of access. The journals during the reign of Elizabeth record for the most part a demand for 'ancient liberties', or a use by the Speaker of 'ordinary' or 'accustomed' petitions. From other sources [2] we ascertain that these included the three claims first made together in 1554, and the practice seems to have become regular by the end of the sixteenth century.

The privileges claimed of the Crown by the Commons are first expressed generally as 'their ancient and undoubted rights and privileges'; and then 'particularly that their persons might be free from arrests and molestations; that they may enjoy liberty of speech in all their debates; may have access to His Majesty's royal person whenever occasion shall require; and that all their proceedings shall receive from His Majesty the most favourable construction.'

So the House asks for three things: freedom of the person; freedom of speech; and certain rights of a merely

[1] Pollard, Evolution of Parliament, p. 126.

[2] D'Ewes' Journal, pp. 65, 66.

formal character. These last admit of brief treatment, and we will take them first ; then we will deal with freedom from arrest and freedom of speech ; then with certain privileges not expressly demanded by the Speaker ; lastly with the limitation of privilege by Courts of Law.

(a) *Formal Privileges.*

'The best construction.'

The House has asked for, and is entitled to, liberty of speech in the matter and manner of debate ; it is merely by courtesy that it asks to have the best construction put upon its proceedings.

Right of access.

The right of access is one which the House enjoys collectively, when an address to the Crown is to be presented by the Speaker, and is thus distinguishable from the right of each individual peer, as an hereditary counsellor of the Crown, to have audience of the Sovereign. But the House can communicate with the Crown through such of its members as are Privy Councillors, and can have access to the Sovereign in that capacity ; in fact the privilege is only important as a mode of giving emphasis to any communication which the Commons may desire to make to the Sovereign.

The other two privileges specially mentioned are of great practical importance and confer rights, not only against the Crown, but against the public.

(b) *Freedom from Arrest.*

The first of these is freedom from arrest for the persons of members during the continuance of session, and for forty days before its commencement and after its conclusion.

Object of this privilege.

The object of the privilege was doubtless to secure the safe arrival and regular attendance of members on the scene of their Parliamentary duties : the privilege itself may perhaps relate back to the Saxon rule that such persons as were on their way to the *gemot* were in the king's peace. It never was held to protect members from the consequences of treason, felony, or breach of the peace. In 1763 both Houses resolved, in the case of Mr. Wilkes, that it did not extend to the writing and publishing of seditious libels, and since that time the rule has been considered settled that

'privilege is not claimable for any indictable offence[1].' Nor does privilege protect a member from being committed to prison for contempt of Court. A committee of privileges was appointed to deal with the case of Mr. Long Wellesley in 1831: he had taken a ward in chancery, his own daughter, out of the jurisdiction and had been committed for contempt by the Lord Chancellor, Lord Brougham. The committee reported that his claim of privilege ought not to be admitted. A series of cases[2] since that date has confirmed the opinion expressed by the Committee of 1831.

But within the limit of civil cases the privilege was made a cause of hardship to suitors, for not only was the member's person protected from arrest and his property from legal process, but rights of action were held in abeyance, since proceedings could not even be commenced against a member or his servant.

Its legislative history.

The history of legislation on this subject may be briefly noted. In 1603 arose the case of Sir Thomas Shirley, a member of the House, who had been imprisoned in the Fleet. The Commons sent their officer to demand his release, and on a refusal committed the Warden of the Fleet to the Tower for contempt. Sir Thomas was after some time released, and thereon the Warden was reprimanded by the House and was also set free. But a Statute was passed (1 Jac. I, c. 13) which was the first legislative recognition of this privilege, and was also some protection to the suitor and to the keeper of the prison. It provided that the suitor should not lose his right of action because he had once taken his debtor in execution, but that the right should revive after the privilege had expired. It further provided that the officer releasing a prisoner from arrest on claim of privilege should not be charged in any action for allowing his prisoner to escape.

Its abuse.

A practice came into use, not long after Shirley's case, of staying proceedings by a letter from the Speaker, in actions commenced against members. Not merely arrest of the person, but distress of goods and the taking of any

[1] Sess. paper, 1831 (114).

[2] See cases collected in May, Parl. Practice (ed. 12), pp. 116 *et seq.*

proceedings at all in an action against a member was regarded as a breach of privilege, unless the member consented to waive his right; and a member's servants were held to be covered by the privilege of their master.

Remedies.

To remedy this hardship on suitors, it was enacted in 1700 (12 & 13 Will. III, c. 3) that suits might be commenced against members and their servants in the principal courts of law and equity during a dissolution, a prorogation, or an adjournment for more than fourteen days, and that during such times judgment might be given and goods taken in execution.

The Act 2 & 3 Anne, c. 18, provided that penalties and forfeitures against privileged persons employed in the revenue or in any office of public trust, should not be stayed on ground of privilege; and 11 George II, c. 24, extended the effect of the Act of William III to proceedings in any court of record.

But the privilege was not reduced to reasonable limits until 10 George III, c. 50. This statute allowed any action or suit to be commenced and prosecuted, at any time, against members and their servants: and no process thereupon was to be stayed by reason of privilege; only the persons of members were privileged from arrest and imprisonment.

Its present extent

Thus the members' servants entirely lost their immunity, and the members themselves only retained the privilege of freedom from arrest for a period which was said to extend to forty days before and after the meeting of Parliament. This period was long unsettled by statute or judicial decision, though it was generally assumed to include, as well the duration of a Parliament, as the forty days before and after a Parliament sat. It was held in Mr. Duncombe's case [1] that long custom, though unexplained, had thus fixed the extent of the immunity. The explanation does not seem very difficult. The privilege was designed to secure the protection of a member 'eundo, morando, et exinde redeundo'; the old notice of summons required in Magna Charta was forty days, and this period would therefore be supposed to cover the utmost time required by a member for coming to a Parliament and returning home.

[1] *Goudy* v. *Duncombe*, 1 Exch. 430.

It should be added, that privilege of Parliament operates to take a member out of custody if he is elected while in custody, always supposing that he is not in custody for an indictable offence or for contempt of Court [1].

The Speaker continued to include *estates* of members in his demand for privileges until the Parliament which met in 1857, and their *servants* until August 1892.

Akin to the privilege of freedom from arrest is the privilege, now always waived, of resisting a subpoena to attend as a witness [2]; and the privilege, now confirmed by statute [3], of exemption from liability to serve on juries.

By s. 128 of the Bankruptcy Act, 1914, if a person having privilege of Parliament commits an act of bankruptcy, he may be dealt with under the Act in like manner as if he had not such privilege.

(c) *Freedom of Speech.*

This privilege, though claimed as resting upon the ancient custom of Parliament, has been confirmed by judicial and legislative sanction on divers occasions.

In 1397 the Commons adopted a bill laid before them by one Haxey to reduce the charges of the royal household. The King rebuked the Commons for discussing such matters, and demanded the name of the introducer of the bill. The House gave up the name of Haxey with many expressions of regret for his conduct. He was condemned in Parliament as a traitor, and was saved from death only by the interposition of Archbishop Arundel [4].

Haxey's case.

In the first year of Henry IV, Haxey petitioned the King for the reversal of this judgment, as being 'encontre droit et la curse quel avoit este devant en Parlement', and it was reversed by the King with the advice and assent of the Lords spiritual and temporal [5].

[1] 74 Com. Journ. 44; 75 Com. Journ. 230. It also continues for forty days after the meeting of Parliament, even though a prorogation or dissolution intervenes, and even though the member is not a member of the new Parliament: *Re Anglo-French Co-operative Society*, 14 Ch. D. 533.

[2] May, Parl. Practice (ed. 12), 111.

[3] Juries Act, 1870 (33 & 34 Vict c. 77), s. 9.

[4] Haxey would seem to have been a clerical proctor attending under the *praemunientes* clause. See Stubbs, Const. Hist. ii. (5th ed.) 516, footnote 2.

[5] 3 Rot. Par. 430.

This amounted to a judicial recognition of the privilege by the Crown and House of Lords; and the Commons further petitioned the King on their own behalf to reverse the judgment 'si bien en accomplissement de droit come pur salvation des libertes de les ditz Communes [1].' The King assented to their petition, and the judgment was held to be 'wholly reversed, repealed, annulled, and held of none effect.'

Strode's case.

In Strode's case, a prosecution was commenced in the Stannary Court against a member who had introduced certain bills for the regulation of the tin mines in Cornwall. He was fined and imprisoned; and thereupon an Act was passed declaring that not only as regarded Richard Strode, but as regarded all members of that or any future Parliament, legal proceedings 'for any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament, to be communed or treated of, should be utterly void and of none effect [2].'

The Tudors and free speech.

Yet the Tudors and the first two Stuarts were strongly disposed to limit the freedom of speech and matter of deliberation in Parliament. Members whose speech in matter or manner was obnoxious to the Court were summoned before the Council, committed to prison, or forbidden to attend Parliament till further notice [3]. And the royal view of the extent of the privilege is thus defined by the Lord Keeper in reply to the Speaker's petition. 'Privilege of speech is granted, but you must know what privilege you have; not to speak every one what he listeth or what cometh in his brain to utter that; but your privilege is, *aye* or *no*. Wherefore, Mr. Speaker, Her Majesty's pleasure is, that if you perceive any idle heads that will not stick to hazard their own estates: which will meddle with reforming the Church, and transforming the Commonwealth, and do exhibit any bills to such purpose, that you receive them not, until they be viewed and considered by those who it is fitter should consider of such things and can better judge of them [4].'

1593.

[1] 3 Rot. Par. 434.

[2] 4 Hen. 8, c. 8.

[3] 4 Parl. Hist. 149, and Cobbett, Parl. Hist. i. 870; and see Prothero, Statutes and Constitutional Documents, pp. 118–126.

[4] Cobbett, Parl. Hist. i. 862; but see English Hist. Review, vol. 31, p. 128.

The line taken by the Tudor and Stuart sovereigns on this question of freedom of speech shows that the House had to struggle not merely for latitude of discussion, but for the existence of its initiative in legislation and in deliberation. The Crown maintained and the House denied that the Commons were summoned merely to vote such sums as were asked of them, to formulate or to approve legislation or topics of legislation submitted to them, and to give an opinion on matters of policy if, and only if, they were asked for one. A standing protest against this contention on the part of the Crown survives in the practice, at the beginning of every Session, of reading a bill for the first time before the King's Speech is taken into consideration[1].

1629. The proceedings in the King's Bench against Eliot, Hollis, and Valentine for seditious speeches in Parliament, and for an assault upon the Speaker, are the last instance of legal proceedings being taken against members of the House in contravention of their privilege of free speech. A conviction was obtained against these men upon the charges made against them, but in the following reign the judgment was reversed in the House of Lords upon writ of error. One cause of error stated was that words spoken in Parliament could only be judged in Parliament and not in the King's Bench; another was that two offences were dealt with by the judgment of the King's Bench, the assault on the Speaker, and the utterance of seditious words in Parliament; and it was alleged that even if the assault was proper to be dealt with by the Court of King's Bench, the words spoken in Parliament could not be dealt with out of Parliament[2].

Eliot's case.

The Commons upon this occasion thought it well to resolve that the Act of Henry VIII was not a special Act passed for the benefit of Strode, but a general Act declaring and confirming the existing privileges of the House.

Bill of Rights. Finally, 1 Will. & Mary, s. 2, c. 2, enacts 'that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.'

[1] *Ante*, p. 67. [2] 3 State Trials, 294.

But though we find no instances after the Revolution of proceedings taken in any Court at the instance of the executive for words spoken in Parliament, yet the free speech and action of members was not unfrequently interfered with, in the case of such as had any office or commission to lose, by a minister like Walpole or a King like George III. It is true that Walpole was trying to create party government by an unscrupulous exercise of party discipline; and that George III wanted to destroy party government by an equally unscrupulous use of royal influence; but each wanted to get his own way, and to do so at the expense of freedom of debate.

Freedom of speech in the 18th century.

It is a necessary result of party government that a minister should cease to hold political office if he votes against his party in matters which the leaders of the party do not regard as open questions. No injustice is done, nor any privilege infringed by the dismissal from office of one who has taken office on the terms, not perhaps precisely stated, but none the less clearly understood, that in Parliament he will act in accord with those other servants of the Crown who are responsible for the policy of the country. But an officer in the army or the navy does not hold his commission on the terms that if he should sit in Parliament he will support the King's ministers. Nor does the Lord Lieutenant of a county hold office on these conditions. To take away such offices for speech or vote in Parliament is an invasion of privilege. But neither Walpole nor George III were disposed to brook opposition in Parliament from those whom it was in their power to punish. The case of General Conway in 1764, which was the last of the kind, will suffice for illustration. For opposing the ministry of George Grenville on the question of general warrants, he was dismissed from the King's service, not only as a Groom of the Bedchamber, but also as Colonel of a regiment. 'My overt acts,' he says, 'have been only voting as any man might from judgment only in a very extraordinary and serious question of personal liberty [1].'

Case of General Conway.

[1] Walpole's Letters, ed. Cunningham, iv. 229. Conway to Lord Hertford, 23rd April, 1764.

The practice was very shortly afterwards discontinued; in fact Burke claims credit to the Rockingham ministry of the following year for having 'abolished the dangerous and unconstitutional practice of removing military officers for their votes in Parliament [1].'

Freedom of speech controlled by the House.

Speech and action in Parliament may thus be said to be unquestioned and free. But this freedom from external influence or interference does not involve any unrestrained licence of speech within the walls of the House. The House controls the action of its own members, and enforces this control by censure; by suspension from the service of the House [2]; by commitment; by expulsion. Abuse of the forms of debate; irregular or disrespectful use of the King's name; the use of language which is offensive or insulting to either House, or to individual members of either House, or to Parliament collectively, are the offences which may be thus dealt with [3].

But from the assertion of the privilege of freedom of speech have grown two matters of practice with regard to the presence of strangers in the House, and the publication of its proceedings and debates.

(d) *Freedom of Speech in relation to the Exclusion of Strangers.*

Grounds for excluding strangers.

The House has always claimed and enjoyed the right to exclude strangers and to debate with closed doors, and this for two reasons. The first was the inconvenience to which in former times members were put when, owing to the arrangements of the House, it was possible for strangers to come so far within the body of the House, that, on one occasion at least, a stranger was counted in a division [4].

1771

[1] Short Account of a late Short Administration.

[2] Standing Orders, 18.

[3] For a full account of the rules for enforcing order in debate the reader is referred to May, Parliamentary Practice (ed. 12), ch. xii.

[4] 33 Com. Jour. 212. After a division on motion made and question put, 'That Mr. Speaker do now leave the chair,' 'it having happened that among the members who were coming in on the division a stranger who had continued in the lobby after it was cleared had come in, and was told as one of the Noes, several members objected to the validity of the division,

The other reason was the possible intimidation which might be exercised by the Crown if reports were made of the speech and action of members, in days when freedom of debate was not fully recognized as a privilege of the House.

Resolution of 1875.

The custom was that, if a member took notice of the presence of strangers, the Speaker was obliged to order them to withdraw. The custom was found in the year 1875 to work inconveniently: certain members who were connected with the Press thought it wrong that reporters should be present only on sufferance, and endeavoured to reduce the rule to an absurdity by frequent notice of the presence of strangers. The House therefore resolved, after some discussion, 'that if, at any sitting of the House or in Committee, any member shall take notice that strangers are present, Mr. Speaker, or the Chairman (as the case may be), shall forthwith put the question that strangers be ordered to withdraw, without permitting any debate or amendment: provided that Mr. Speaker and the Chairman may, whenever he think fit, order the withdrawal of strangers from any part of the House.' This resolution is now embodied in one of the Standing Orders of the House [1].

During the autumn of 1908 the disorderly conduct of some occupants of the ladies' and strangers' galleries caused the Speaker to close these galleries to strangers during the remainder of the Session [2]. They were also closed in the autumn of 1920 and for many months subsequently, owing to the apprehension of disorder connected with events in Ireland.

and insisted that the question ought to be put again and the sense of the House taken. Mr. Speaker immediately on declaring the numbers had ordered the doors of the House to be locked, in order that no member might go forth. The Stranger was then brought to the Bar and examined, and it appearing that what he had done was from ignorance and inadvertency, and without any intention of passing for a member on a division, and being known to several members as a man of good character, he was for the present ordered to be taken from the Bar.' He was afterwards dismissed with a caution.

[1] Standing Orders, 90.

[2] They were not re-opened until May, 1909.

(e) *Freedom of Speech in relation to the Publication of Debates.*

Grounds for controlling publication.

Following upon the power to exclude strangers, so as to obtain, when necessary, such privacy as may secure freedom of debate, comes the right of the Commons to prohibit the publication of proceedings in their House.

The House of Commons of the Long Parliament was the first to forbid a member 'to give a copy or publish in print anything that he shall speak here without leave of the House[1]': and subsequently printers were warned to give account of the communication to them of matters which took place in the House[2].

Reporting in the 18th century.

Accounts of the votes and proceedings were ordered in 1680 to be printed under the direction of the Speaker, and the Journals at one time contained something more than a dry record of business actually transacted. But, as early as the close of the sixteenth century, secrecy as to what men said and how they voted was regarded as an obligation upon members; and after the Revolution frequent resolutions forbade the publication of proceedings on pain of incurring the penalties of breach of privilege.

In 1738, during the ministry of Sir Robert Walpole, the leaders of the three great parties in the House took part in an interesting debate on this subject. Walpole held that it was impossible to be secure against misrepresentation if the report of debates was allowed. Wyndham, the leader of the Tories, thought that 'the public ought to be able to judge of the merits of their representatives.' Pulteney, who led the malcontent Whigs and professed to represent the popular party, took the least popular ground, and said plainly that he would not be 'made accountable without doors for what he said within[3].'

The fear of misrepresentation was not unfounded: newspaper reporting was in its infancy: nor was there any great desire to represent fairly what was said by politicians whose opinions were opposed to those of the

[1] 2 Com. Jour. 209.
[2] 2 Com. Jour. 220.
[3] Parl. Hist. x. 811.

reporter [1]: the best reports of the time are evidently far from faithful reproductions of what passed in the House. But though the House, as the result of the debate just described, condemned the publication of any account of its proceedings as 'a high indignity and a notorious breach of privilege,' the practice of reporting continued.

Down to the year 1771 such accounts of debates as were made public appeared in magazines which came out monthly or quarterly, and after the resolution of 1738 the House and speakers figured under feigned names [1]. But in 1771 notes of debates, by no means careful as to accuracy, began to appear in daily journals; to these reports of speeches the names of the speakers were attached, sometimes with comments and nicknames of an offensive sort. Thereupon the House entered upon a serious and complicated conflict with the Press.

Conflict between House and City, 1771.

In the course of a series of attacks upon printers and publishers, the Commons sent a messenger into the City to arrest a printer of debates; the printer sent for a constable and gave the messenger into custody for assaulting him in his own house. All parties went to the Mansion House, where the Mayor and two aldermen, Wilkes and Oliver, discharged the printer, holding that, by virtue of the City charter, a warrant of the House was of no force within the City unless backed by a City magistrate: but they committed the messenger for an assault, allowing him to go free on bail. The House of Commons sent for the Lord Mayor and the two aldermen, for the Lord Mayor's clerk and the book of recognizances. They erased from the book the entry as to the messenger's recognizances, and committed the Mayor and aldermen to the Tower. A House which could unwarrantably interfere with the procedure of a court of justice was not unlikely to disregard the opinion or the interests of the public. Nevertheless, the Commons were alarmed by the strong feeling exhibited by the people

[1] Dr. Johnson wrote the debates for the Gentleman's Magazine in 1740–3, under the name of the 'Senate of Lilliput' and 'always took care to put Sir Robert Walpole in the wrong'. He admitted many years later that they were 'frequently written from very slender materials, and often from none at all'.

of London on behalf of the City officers, and this was the last occasion on which this privilege was insisted upon. With the impunity accorded to reporters, the practice of reporting has improved, and the House, sensible of the advantages which it derives from a full and clear account of its debates, has given increased facilities to those who report them [1].

We are accustomed, therefore, to be daily informed, throughout the Parliamentary Session, of every detail of events in the House of Commons: and so we are apt to forget two things.

Reporting is on sufferance.

The first is, that these reports are *made* on sufferance, for the House can at any moment exclude strangers and clear the reporters' gallery; and that they are also *published* on sufferance, for the House may at any time resolve that publication is a breach of privilege and deal with it accordingly [2].

Limit to right to publish debates.

The second is, that though the privileges of the House confer a right to privacy of debate, they do not confer a corresponding right to the publication of debate. Apart from powers conferred by Statute, the right of the House of Commons to publish its proceedings, otherwise than for the use of its members, would be limited by the common law rules as to defamation of character; and it would be no answer to an action for libel brought against the publisher that the libellous matter was a part of a debate in the House of Commons, or was a part of a report made for the use of the House, and printed and published by its order. Still less is a private member entitled to claim privilege for the publication of a speech delivered within the walls of the House. Within those walls he may say what he pleases, and is protected by the general privilege of the House; but if he chooses to circulate outside the House statements made within it, he does so at his peril,

Privilege cannot legalize defamation.

[1] An official Report of the debates is also published under the authority of the House itself.

[2] In 1916 the unusual course was taken of issuing a Regulation (27A) under the Defence of the Realm Act, which made it an offence for any person to publish a report of any secret session of either House, or to describe or even to refer to the proceedings at such session. The Regulation was only intended to be operative during the war, and no longer exists.

and if they contain defamatory matter he will be liable to proceedings for libel.

The extent to which the publication of Parliamentary proceedings has, in this respect, been protected by judicial decision or statutory enactment, may thus be traced.

Publication by private member,

It was held in *Lake* v. *King*[1] that an action would not lie for defamatory matter contained in a petition printed and delivered to members, this being agreeable to the course and proceedings of Parliament. And if it is permissible to a private individual to circulate in the form of a petition among members that which would be libellous if published otherwise, it follows, as of course, that no words spoken by a member in the course of Parliamentary proceedings, or papers printed and circulated by order of the House among its members, would be actionable.

But directly publication ceases to be limited to the use of members of the House the law of libel takes effect. Mr. Creevy in 1813 made a charge against an individual in a speech delivered in the House. His speech was misreported, and he sent a corrected report to the editor of a local paper. He was held liable to a criminal information for libel[2].

by order of the House.

Nor is it any defence, at common law, that defamatory statements have been published by order of the House. In the case of *Stockdale* v. *Hansard*[3] it appeared that the House of Commons had ordered the printing of copies of certain reports, not for the use of members only, but in numbers sufficient to make some copies available for sale to the public. One of these reports contained matter defamatory of the plaintiff. He sued the publisher, and Lord Denman ruled, and the Court of Queen's Bench upheld his ruling, that the House could not by its order legalize 'the indiscriminate publication and sale of all such papers as the House may order to be printed for the use of its members.'

The controversy between the House and the Court of Queen's Bench, of which this decision forms a part, raised

[1] 1 Saund. 131 [1667].

[2] *R.* v. *Creevy*, 1 M. & S. 278.

[3] 9 A. & E. 1.

a wider question, to be dealt with hereafter, as to the relation of Courts of Law to questions of Privilege. But the case does fix the limits of the right of the House to publish its proceedings on matters connected therewith, and settles that, apart from statutory protection, such publication, if defamatory, is actionable unless it is confined to members of the House. Relief was given in cases of this sort by the Parliamentary Papers Act, 1840 [1], which enacts that a certificate from any one of certain officers of either House, verified by affidavit, and stating that the publication was made by authority of the House of Lords or House of Commons, should be an immediate stay of any civil or criminal proceedings taken in respect of defamatory matter contained in the publication.

But a fair report is privileged.

Thus far it was settled that statements published by authority of either House, though injurious to the character of an individual, would not give a cause of action for libel. In 1868 a further question arose. The editor of a newspaper, with no hostile or malicious intention, but solely with a view to his own profit, published a fair report of proceedings in Parliament, which contained matter defamatory of an individual. The publication could not be said to be authorized by Parliament except in so far as the exclusion of reporters at the will of the House might have made such a report impossible. It was held by the Court of Queen's Bench, that such publications were lawful, and that while 'honestly and faithfully carried on, those who publish them will be free from legal responsibility, though the character of individuals may incidentally be injuriously affected.'

But such publication is carefully distinguished from the publishing of his speech by an individual. 'There is obviously,' says Cockburn, C.J., 'a very material difference between the publication of a speech made in Parliament for the express purpose of attacking the conduct of an

[1] 3 & 4 Vict. c. 9. The Act extends to protect a person who bona fide and without malice prints and publishes an extract from or abstract of a parliamentary paper, though not by or under the authority of either House of Parliament: *Mangena* v. *Wright* [1909] 2 K.B. 958.

individual, *and afterwards published with a like purpose or effect*, and the faithful publication of Parliamentary reports in their entirety, with a view to afford information to the public, and with a total absence of hostile intention or malicious motive towards any one[1].'

§ 3. *Privileges of the House not demanded by the Speaker.*

So far we have dealt with those privileges of the House which are demanded by the Speaker and granted by the Crown at the commencement of each Parliament. But there are other privileges which would seem to be considered inherent in the House, which are at any rate undoubtedly exercised by it, though they are not specifically claimed from the Crown.

(a) *Right to provide for its proper Constitution.*

One of these privileges is the right to provide for the proper constitution of the body of which it consists, by the issue of writs when vacancies occur during the existence of a Parliament; by enforcing disqualifications for sitting in Parliament; and, until 1868, by determining disputed elections.

Filling of vacancies.

(1) When a vacancy occurs in the House from any cause which legally vacates a seat, or when a member is returned for two places and makes election which he will serve for, a warrant is issued by the Speaker, in pursuance of an order of the House, to the clerk of the Crown in Chancery, or, in the case of a seat in Ireland, to the clerk of the Crown in Ireland, for the issue of a writ for the return of a member to supply the vacancy. If the House is not sitting no authority could be given for the issue of the warrant, but this inconvenience is met, in nearly every case in which it could occur, by a series of Statutes which require the Speaker to issue his warrant, subject to certain restrictions, if a member should vacate his seat during the recess, by death, by elevation to the peerage, by bankruptcy, or by the acceptance of office, excepting always those formal

[1] *Wason* v. *Walter*, L. R. 4 Q. B. p. 85.

offices which members take in order to effect a resignation of their seats in Parliament [1].

Trial of disputed returns.

(2) The right to determine questions of disputed returns, claimed and exercised by the Commons from 1604 to 1868, was assigned by the Parliamentary Elections Act, 1868,[2] to a judge of one of the superior Courts of Common Law, and is now exercised by the King's Bench Division of the High Court. The claim of the House to jurisdiction in this matter was always doubtful, though exercised without question after 1604. Originally the writ addressed to the sheriff was returnable to Parliament: an Act of the 7th Henry IV provided that it should be returned to Chancery; if the return was disputed the matter was decided by the King, assisted by the Lords, though an Act of 1410 gave jurisdiction in the matter to the Judges of Assize [3].

Fortescue and Goodwin.

In the reign of Elizabeth the Commons claimed the right; in 1604 they insisted upon it. The case arose upon a disputed return for the county of Bucks, and the proceedings are worth noting.[4] James I, in the proclamation for calling his first Parliament, took upon himself to admonish all persons concerned with the election of knights of shires, that, among other things, they should take express care that no bankrupt or outlaw was elected; he further announced that all returns should be made to the Chancery, and that if such returns were contrary to the tenor of his proclamation, they 'should be rejected as unlawful and insufficient'.

Sir Francis Goodwin, an outlaw, was returned for the county of Bucks. On the return of his election being made, it was refused by the clerk of the Crown on the ground of

[1] The Statutes are—as to death or peerage, Recess (Elections) Act, 1784 (24 Geo. 3, c. 26); as to office, Election of Members during Recess Act, 1858 (21 & 22 Vict. c. 110); as to bankruptcy, Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 33; as to certain formalities, Elections in Recess Act, 1863 (26 & 27 Vict. c. 20). The formal offices excepted are the Stewardships of the Chiltern Hundreds, of East Hendred, Hempholme, Northstead, or the escheatorship of Munster. Of these the first and fourth alone survive (*ante*, p. 99).

[2] 31 & 32 Vict. 125 [3] Stubbs, Const. Hist. iii. (5th ed.) 438.

[4] Parliamentary History, vol. i, p. 998 *et seq.*

the outlawry. The clerk issued a new writ on his own authority, and Sir John Fortescue was returned.

The House inquired into the matter, and having examined the clerk of the Crown, resolved that Goodwin was duly elected, and ordered the indenture of his return to be filed in the Crown office.

The Lords first took the matter up, and asked an explanation of the Commons; the Commons refused to discuss the question. A message then came from the Lords that the King desired the two Houses to confer upon the election. The Commons thereupon demanded access to the King, and stated the grounds of their action. The King asserted that returns 'being all made into the Chancery are to be corrected and reformed by that Court only into which they are returned', and he desired the House to hold a conference with the Judges. This, after a long debate, the House determined not to do, but submitted an argumentative memorial to the King, meeting his objections and alleging precedents for the right they claimed. It is noticeable, that of the five precedents set forth, two only are cases of disputed returns, two are cases of disqualified persons being returned, and one a case of a member being returned for two places.

The King was not satisfied with the answer of the House; he still desired a conference between the Commons and the Judges. To this the Commons reluctantly assented; a conference took place before the King and council, and the King in the end admitted the right of the House to be a court of record and judge of returns, though he claimed a corresponding jurisdiction for the Chancery; and he suggested as a compromise, that the elections of Fortescue and of Goodwin should both be held void and a new writ issued. This was done, and the right of the Commons was not afterwards questioned nor that of the Chancery asserted.[1]

Modes of trial.

For some time disputed returns were decided by a Com-

[1] It is proper to note here a distinction between the claim of the Chancery in the case of Fortescue and Goodwin, to adjudicate upon a disputed return, and the claim of the Chancellor, Lord Shaftesbury, in 1672, to issue writs to supply vacancies during a recess without a warrant from the Speaker.

mittee of Privileges and Elections nominated by the House. This became an open committee of the whole House after 1672, and finally, in the time of Speaker Onslow, the confidence felt in him caused the parties to these suits to ask a trial at the bar of the House.

1727–1761.

Trial at bar.

It would have been difficult to find a worse tribunal. As the trial was before the whole House, no single member felt any individual responsibility. The tribunal was a large and fluctuating body, wanting alike in the training and the inclination to act judicially. In fact, a disputed return was settled by a party division. The closing struggles of Walpole's ministry in December, 1741, turned, not on his foreign or domestic policy, but on votes of the House taken on election petitions. 'Last Friday,' says Horace Walpole, 'we carried a Cornish election. . . . You can't imagine the zeal of the young men on both sides.' 'Tuesday, we went on the merits of the Westminster election, and at ten at night divided and lost it. They had 220, we 216; so the election was declared void. We had forty-one more members in town who would not, or could not, come down. *The time is a touchstone for wavering consciences.* All the arts, money, promises and threats, all the arts of the former year are applied, and self-interest operates to the aid of their party and the defeat of ours[1].' The merits of the disputed election troubled no one: the trial to conscience was the question of deserting a minister whose fall was clearly imminent. Finally, the loss of the Chippenham election petition determined Walpole to resign.

Under the Grenville Act.

Some improvement was effected when Mr. Grenville, in 1770, introduced and carried the Act known as the Grenville Act,[2] at first a temporary measure, but afterwards made permanent. This Act transferred the decision of disputed returns from the House to a committee, selected from a list chosen by lot, of forty-nine members, from which list the petitioner and sitting member struck out names alternately until the number was reduced to thirteen. Each party nominated an additional member, and the case was tried

[1] Letters of Horace Walpole (ed. Toynbee), i. pp. 144, 147.

[2] 10 Geo. 3, c. 16.

by this tribunal, to which was given the power of administering an oath. No appeal lay to the House, whose privileges in this respect were henceforth limited by the operation of the Statute. The committee was a more responsible tribunal than the House at large; it had a better chance of arriving at an impartial decision, and the power of administering an oath enabled it to obtain evidence on which it might rely: but its members could not fail to be interested on party grounds in the result of their decision, and being selected by lot, they had not necessarily any trained judicial capacity.

Under the Parliamentary Election Acts.

Acts of 1841[1] and 1848[2] reduced the number of the committee and made some changes in the mode of its appointment, but it was not until 1868 that the House adopted the only course by which a really satisfactory decision of controverted elections could be attained, and handed them over, not without protest from the judges[3], to the Courts of Law. The rules for their trial are now to be found in the Parliamentary Elections Act, 1868[4], and an amending Act of 1879[5]. The petition is presented, not to the House but to the High Court of Justice; the trial is conducted, not by a committee of the House at Westminster, but by two Judges of the High Court in the borough or county of which the representation is in issue. The Judge certifies his decision to the Speaker, and the House, on being informed of the certificate by the Speaker, is required (sect. 13) to enter the same upon the Journals, and to give such directions for confirming or altering the return, or for the issue of a new writ, as the form of certificate may necessitate.

Notice of disqualification.

(3) The House has given over to the Law Courts the right to determine controverted elections; that is to say,

[1] 4 & 5 Vict. c. 58. [2] 11 & 12 Vict. c. 98.

[3] 'Letter from the Lord Chief Justice of England in the name, and with the unanimous authority, of all the Judges, protesting against the Parliamentary Elections Bill as "an impossibility". In short, the Judges have struck!' Disraeli to Lord Derby, Feb. 6, 1868: Life of Disraeli, iv. 581.

[4] 31 & 32 Vict. c. 125.

[5] Parliamentary Elections and Corrupt Practices Act, 1879 (42 & 43 Vict. c. 75).

elections which are called in question on the ground that a candidate, otherwise properly qualified for a seat, has been returned in an informal manner, or by persons who were not entitled to vote, or by votes procured through improper inducements. But it retains the right to pronounce at once on the existence of legal disqualifications in those returned to Parliament, and will declare a seat to be vacant, if the member returned is subject to such disqualification, without waiting for the return to be questioned by persons interested in the matter. The case of O'Donovan Rossa, February 10, 1870, of John Mitchel, February 18, 1875, of Michael Davitt, February 28, 1882, of A. A. Lynch, March 2, 1903,[1] are instances of the exercise of this right by the House of Commons.

The case of John Mitchel, who was twice elected, illustrates best the action of the House in such matters. In the first instance, no petition was lodged, and the House declared the seat vacant. On the occasion of his second election, a petition was lodged, and the seat claimed by the other candidate: the House allowed the disqualification to be determined by the Courts; but it does not follow that the House was bound to await the decision of a Court of Law.

Ante, p. 91.

Unfitness to serve, a cause of expulsion.

(4) Cases may arise in which a member of the House, without having incurred any disqualification recognized by law, has so conducted himself as to be an unfit member of a legislative assembly. For instance, conviction for misdemeanour is not a disqualification by law though it may be a disqualification in fact, and the House of Commons is then compelled to rid itself of such a member by the process of expulsion. But expulsion, although it vacates the seat of the expelled member, does not create a disqualification; and if the constituency does not agree with the House as to the unfitness of the member expelled, they can re-elect him. If the House and the constituency differ irreconcilably as to the fitness of the person expelled—expulsion and re-election might alternate throughout the continuance of a Parliament.

Effect of expulsion.

In 1769 the House, irritated by the re-election of Wilkes

[1] For these cases, see May, Parl. Practice (ed. 12), pp. 583–5.

whom it had expelled, proceeded not merely to expel him again but to declare his election void. The House thus endeavoured to create a new disability depending on its own opinion of the unfitness of Wilkes to be a member of its body. Being at that time a judge of returns the House was able to give effect to its decision, and in February 1770 to declare a subsequent re-election of Wilkes to be void, the votes recorded in his favour to be thrown away, and the candidate next on the poll to be duly returned.[1]

But the arbitrary conduct of this House of Commons was not imitated by its successors. Wilkes was elected to serve in the new Parliament of 1774 and took his seat without question.

In 1782 a resolution which he had moved in five previous years was carried, and the vote which declared his election void, and all the declarations, orders and resolutions respecting the Middlesex election,[2] were expunged from the Journals of the House.

It may be useful to set out the manner of proceeding where a member has been convicted of misdemeanour and has thereby incurred the penalty of expulsion.

Process of expulsion.

The judge who presides at the trial and gives sentence communicates the fact to the Speaker, and the Speaker informs the House of what has occurred.

A motion is then made that a humble address be presented to the King to give directions that a copy of the Record of the proceedings at the trial be laid before the House. This being done, on a subsequent day the House is moved :

That the letter addressed to Mr. Speaker, by Mr. Justice —— respecting the conviction before the Central Criminal Court of *A. B.* member for —— might be read, and the same was read as follows :

Mr. Speaker,

I beg to inform you that *A. B.* M.P. was this day convicted

[1] A similar line of action was adopted by the House in 1712, when Walpole was expelled the House, and re-elected by his constituents. The election was declared to be void, and no further question was raised. Cobbett, Parl. Hist. vi. 1071.

[2] May, Const. History of England, i. 414, where a full account of the Wilkes controversy is to be found.

of a misdemeanour for which I have sentenced him to twelve calendar months' imprisonment.

And I have the honour to remain, &c. &c.

A motion is then made and the question put, that the said letter and record of the proceedings upon the trial of *A. B.* be now taken into consideration.

If it is resolved in the affirmative the House accordingly proceeds to take the letter into consideration, and if the result is unfavourable to *A. B.* it is resolved that *A. B.* be expelled the House [1].

(b) *Right to the exclusive cognizance of matters arising within the House.*

Blackstone lays it down as a maxim upon which the whole law and custom of Parliament is based, 'that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.'

Limits of the right.

This statement cannot be accepted without certain reservations. It is not true to say that because a matter has arisen *concerning* the House, and has been adjudged within the House, such a matter cannot be considered elsewhere, if it affects rights exercisable outside and independently of the House. It is strictly true to say that the House has the exclusive right 'to regulate its own internal concerns', and that, short of a criminal offence committed within the House or by its order, no Court would take cognizance of that which passes within its walls.

Extent of the right.

Case of Mr. Bradlaugh.

The most recent illustration of this statement is the case of *Bradlaugh* v. *Gosset* [2]. Mr. Bradlaugh complained that having been elected and returned member for the borough of Northampton, he had not been allowed to take the oath required by the Parliamentary Oaths Act, 1866 [3], and that, by a resolution of the House, the Serjeant-at-Arms had been ordered 'to exclude Mr. Bradlaugh from the House until

[1] The cases which have furnished ground for expulsion are summarized in May, Parl. Practice (ed. 12), p. 61.

[2] 12 Q. B. D. 271

[3] 29 & 30 Vict. c. 19.

he shall engage no further to disturb the proceedings of the House'. The disturbance in question arose from the attempt of Mr. Bradlaugh to take the oath which the law required him to take, and which a resolution of the House prevented him from taking. He asked the Court to declare the order of the House to be void, and to restrain the Serjeant-at-Arms from carrying it into effect.

The House can interpret rules for its own procedure.

The Court held that it was not concerned with the interpretation which the House of Commons, for the regulation of its internal procedure, chose to place upon a statute; and that the House, having power of exclusion, had power to effect such exclusion by the necessary force. The law on the subject is very clearly set forth in the judgment of Stephen J.[1]

'In order to raise the question now before us, it is necessary to assume that the House of Commons has come to a Resolution inconsistent with the Act; for, if the Resolution and the Act are not inconsistent, the plaintiff has obviously no grievance. We must of course face this supposition, and give our decision upon the hypothesis of its truth. But it would be indecent and improper to make the further supposition that the House of Commons deliberately and intentionally defies and breaks the Statute-law. The more decent, and I may add the more natural and probable supposition, is, that for reasons which are not before us, and of which we are therefore unable to judge, the House of Commons considers that there is no inconsistency between the Act and the Resolution. They may think there is some implied exception to the Act. They may think that what the plaintiff proposes to do is not in compliance with its directions. With this we have nothing to do. Whatever may be the reasons of the House of Commons for their conduct it would be impossible for us to do justice without hearing and considering those reasons; but it would be equally impossible for the House, with any regard for its own dignity and independence, to suffer its reasons to be laid before us for that purpose, or to accept our interpretation of the law in preference to its own. It seems to follow that the House of Commons has the exclusive power of interpreting the statute, *so far as the regulation of its own proceedings within its own walls is concerned;* and that, even

The Courts accept that interpretation.

[1] *Bradlaugh* v. *Gosset*, 12 Q. B. D. 280.

if that interpretation should be erroneous, this Court has no power to interfere with it directly or indirectly.'

They take no cognizance of things done within the House,

The point at which Courts of Law will enter upon a discussion as to the limits of privilege and the effect of resolutions of the House outside its walls is a matter for separate consideration. But the Judges, in the case referred to, state as clearly as it is possible to state a legal proposition, that they would take cognizance of nothing 'which was done within the walls of the House' short of a criminal offence.

except in case of crime.

It should be noted that the Courts have more than once intimated that a crime committed in the House or by its order would not thereby be considered outside their jurisdiction.

Supra, p. 168.

In the case of Sir John Eliot and others above referred to, who were convicted of seditious speeches in Parliament *and of an assault upon the Speaker*, the House of Lords, reversing the judgment upon error, does so on the ground that two distinct offences were included in one judgment, and that one of these offences, the alleged seditious speeches, was not cognizable by the Court of King's Bench. But it was not thereby decided that an assault upon a member of the House, committed within its walls, might not be dealt with in a Court of Law; and Lord Ellenborough, in *Burdett* v. *Abbott*, guards himself by saying that it will be time to consider such a case when it arises [1].

And lastly, Mr. Justice Stephen says 'that he knows of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice [2]'.

(c) *Power of inflicting punishment for breach of Privilege.*

The House is invested, as we have seen, with the exclusive power of regulating its own procedure and adjudging matters which arise within its walls. It follows that the House must possess some power of enforcing its privileges in this respect, and of punishing those who infringe them.

[1] 14 East, at p. 128. [2] 12 Q. B. D. 283.

The offences for which punishment is inflicted may be generally described as disrespect to any member of the House, as such, by a person not being a member: disrespect to the House collectively, whether committed by a member [1] or any other; disobedience to orders of the House, or interference with its procedure, with its officers in the execution of their duty, or with witnesses in respect of evidence given before the House or a Committee of the House.

Admonition.

The mildest form of punishment is by summons to the bar of the House, followed by an *admonition* addressed to the offender by the Speaker. The person so summoned may purge himself of his contempt by an apology accepted by the House in full satisfaction of his offence, and so may escape being admonished.

Reprimand.

A more serious mark of the displeasure of the House is a *reprimand*, addressed to the offender by the Speaker. This however is almost invariably preceded by commitment [2].

Commitment.

Commitment is in the first instance to the custody of the Serjeant-at-Arms, an officer whose appointment and duties have already been described.

Before dealing with the right to commit to custody, or to prison, two other forms of punishment used by the House may be noted.

Fine.

In former times the House of Commons has imposed fines for breaches of privilege, but the practice has long been discontinued, except in so far as the payment of fees as a condition precedent to release from imprisonment partakes of the nature of a fine [3].

Expulsion.

In the case of its own members, the House has a stronger mode of expressing its displeasure. It can by resolution expel a member, and order the Speaker to issue his warrant

[1] The suspension of members from the service of the House after being named by the Speaker would seem to fall more properly under the rules for conducting debate.

[2] For the exceptions see May, Parl. Practice (ed. 12), 94.

[3] May, Parl. Practice (ed. 12), 94-5. No fine has been imposed since 1666: but on April 7, 1892, there was some discussion as to inflicting a fine upon directors of a railway company for dismissing a servant of the company on account of evidence given before a Committee of the House. A considerable minority of the House seemed anxious to vote for forms of punishment which the House had no machinery for enforcing.

for a new writ for the seat from which the member has been expelled. But it cannot prevent the re-election of such a member by declaring him incapable of sitting in that Parliament. In attempting to do this, in the case of Wilkes, the House had ultimately to admit that it could not create a disqualification unrecognized by law [1].

But expulsion is a matter which concerns the House itself and its composition, and amounts to no more than an expression of opinion that the person expelled is unfit to be a member of the House of Commons. The imposition of a fine would be an idle process unless backed by the power of commitment. It is, then, the right of commitment which becomes, in the words of Sir E. May, 'the keystone of Parliamentary privilege.' It remains to consider how it is exercised and by what right.

When a person is committed to the custody of the Serjeant-at-Arms, he may purge himself of his contempt by an apology, or he may be let off with a reprimand, or he may be committed to prison; or, in the case of a flagrant contempt, the person guilty may be committed to prison without being previously brought into the presence of the House or given an opportunity of apologizing.

The limit of imprisonment.

But the power of the House to punish in this manner is limited by the duration of the Session; prorogation releases prisoners committed by its order, whether or no they have paid their fees. The House cannot therefore imprison for any fixed term; if it did so, and a prorogation occurred before the conclusion of the term, the prisoner would be entitled to a discharge upon a writ of *habeas corpus*.

The origin of this power of commitment for contempt has been variously stated.

Grounds of right to commit.

It has been claimed for the House as a right inherent in every Court of Record; but there is much discussion as to whether the House is or is not a Court of Record.

That the House is a Court of Record.

In the case of Fortescue and Goodwin the House vehemently contended that it was a Court of Record: so too in the debate on Floyde's case, where Coke's words are

[1] Parl. Hist. xxii. 1407, and *ante*, p. 183.

summarized: 'No question but this is a House of Record, and hath power of judicature in some cases. Have power to judge of Returns and Members of our House[1].'

But if the House rests its claim on this ground, the claim has been abandoned with the abandonment of the right to determine controverted elections. It might be said that the Journals of the House are records, and this also was maintained by Lord Coke. He rested his arguments on the words of the Act of Henry VIII, which requires licence or leave of absence given to a member 'to be entered of Record in the book of the Clerk of the House'. But it is doubtful whether the word 'record' is there used in a technical sense.

6 Hen. 8. c. 16.

The Journals of the House[2], which are prepared by the clerk of the House from entries of the proceedings made by him daily, perused by the Speaker, and then printed for the use of members, are expressly declared by Lord Mansfield *not* to be matter of record.[3] The *dictum* was not necessary for the purpose of the decision, but may fairly be set off against the statements of Coke, of which one is made in debate, the other in the posthumous volume of the Institutes.

It is noticeable that in the case of *Burdett* v. *Abbott*, while Bayley J. rests the claim of the House to commit on its parity of position with Courts of Judicature, Lord Ellenborough C. J. rests his decision on the broader ground of expediency, and the necessity of such a power for the maintenance of the dignity of the House:

14 East, 152. That the right is needed to maintain its dignity

'If there were no precedents upon the subject, no legislative recognition, no practice or opinions in the Courts of Law recognizing such an authority, it would still be essentially necessary to the Houses of Parliament to have it; indeed, they would sink into utter contempt and inefficiency without it. Could it be expected that they should stand high in the estimation and reverence of the people, if, whenever they were insulted, they were obliged to await the comparatively slow

[1] 1 Com. Jour. 604.

[2] The Rotuli Parliamentorum record the proceedings of Parliament from 1278 to 1503. The Lords' Journals commence in 1509: the Commons' Journals in 1547.

[3] *Jones* v. *Randall*, 1 Cowp. 17.

proceedings of the ordinary Courts of Law for their redress? that the Speaker, with his mace, should be under the necessity of going before a grand jury to prefer a bill of indictment for the insult offered to the House? They certainly must have the power of self-vindication in their hands: and if there be any authority in the recorded precedents of Parliament, any force in the recognition of the Legislature, and in the decisions of the Courts of Law, they have such a power.'

On the whole, it would seem that the right of committal finds a surer basis on the necessity of such a power for the maintenance of the dignity of the House, than on any technicality as to the House being a Court of Record[1].

§ 4. *Limitation of Privilege by Courts of Law.*

Causes of conflict between House and Courts.

The Privileges of Parliament, like the Prerogative of the Crown, are rights conferred by Law, and as such their limits are ascertainable and determinable, like the limits of other rights, by the Courts of Law. They consist, in fact, of rights acquired by custom or conferred by Statute, belonging to the House collectively, or to its members as individuals, and having for their object the freedom, the security, or the dignity of the House of Commons. Cases have arisen in which the House has set up claims which the Courts have been compelled to consider.

Claim of House to determine its privilege.

1. The House has asserted that it is the sole judge of the extent of its privileges. The practical result of this assertion is that the House has declared certain acts, legal in themselves, to be breaches of privileges, or certain acts, unlawful in themselves, to be legalized by its declaration of privilege.

[1] The limited sense in which the term 'Court of Record' would probably be construed may be illustrated from the case of a Colonial Legislature (the House of Assembly of Nova Scotia), which enacted that it was a Court of Record, and on the strength of this enactment punished a contempt of its privilege by imprisonment. The right of the Assembly to do this was upheld by the Judicial Committee. The powers taken to itself by this House were construed to be 'the powers of a Court of Record for the purpose of dealing with breaches of privilege and contempt by way of committal,' but not to 'try or punish criminal offences otherwise than as incident to the protection of members in their proceedings.' *Fielding* v. *Thomas* [1896] A. C. 612.

To this the Courts have made reply, that when privilege conflicts with rights which they have it in charge to maintain, they will consider whether the alleged privilege is authentic, and whether it governs the case before them.

From the mass of learning and argument lavished upon this topic, it will be enough to select three cases and to state shortly their results as illustrating the law.

Ashby v. *White*

In *Ashby* v. *White* an action was brought by an elector for the borough of Aylesbury against a returning officer who had refused to allow him to give a vote to which he was legally entitled.

The right to vote was not in question, only the right to sue for the refusal to allow the voter the exercise of his legal right.

The Commons resolved that 'neither the qualification of any elector, nor the right of any person elected, is cognizable or determinable elsewhere than before the Commons of England in Parliament assembled'; and they further resolved that Ashby was guilty of a breach of privilege in bringing his action into a Common Law Court.

The confusion of ideas which brought about this resolution was curious.

The House of Commons had, beyond doubt, the right to determine the validity of an election. If the House determined that an election was invalid because persons had voted who were not qualified to vote, persons possessing the alleged qualification would thenceforward be disentitled to vote.

The Court of Queen's Bench had, equally beyond doubt, the right to try an action for withholding a Common Law right, such as the franchise, from a man entitled to it. The Court could not determine, and did not profess to determine, any matter which would affect the validity of an election. It must needs inquire into the right of the plaintiff to give a vote, in order to ascertain if the plaintiff had a cause of action.

The House of Commons could have given the plaintiff no remedy; he could only have obtained its decision on his right to vote, by calling in question the validity of the

election. As the candidate for whom he would have voted was elected, he had no inducement to do this; and, if he had done so, the only redress which he might have thereby obtained would have been the committal of the returning officer for contempt. 'Was ever such a petition heard of in Parliament,' said Holt C. J., 'as that a man was hindered of his vote, and praying them to give him a remedy? The Parliament would undoubtedly say, Take your remedy at law. It is not like the case of determining the right of election between the condidates.'

The majority of the Court differed from Holt and held that there was no right of action; on writ of error this judgment was reversed in the House of Lords; there ensued a long altercation between the two Houses, into the details of which it is unnecessary to enter, and the matter was ended by a prorogation.

Stockdale v. *Hansard.*

In *Stockdale* v. *Hansard* the House ordered the publication of matter defamatory of the plaintiff; the defendant set up two defences, that the statements complained of were true, and that, if they were not, the order of the House privileged the publication.

Lord Denman's ruling.

Lord Denman, in trying the case, told the jury that he was 'not aware of the existence in this country of any body whatever that can privilege any servant of theirs to publish libels of any individual'. The jury found for the defendants that the statements alleged to be defamatory were true. But the Commons took offence at the manner in which Lord Denman had dealt with the question of privilege, and passed resolutions, the effect of which has thus been summarized by an eminent authority [1].

Resolutions of House.

'(1) That the order of the House of Commons affords a justification for the sale of any papers whatever which they may think fit to circulate.

'(2) That no Court of Justice has jurisdiction to discuss or decide any question of Parliamentary privilege which arises before it, directly or incidentally.

[1] Mr. Pemberton, afterwards Lord Kingsdown, in his 'Letter to Lord Langdale on the recent proceedings in the House of Commons on the subject of Privilege,' p. 17.

'(3) That the vote of the House of Commons declaring its privilege is binding upon all Courts of Justice in which the question may arise.'

Judgment on demurrer.

Other actions were brought by Stockdale against the Messrs. Hansard, and the House resolved that its printers should plead to the action, but in such a way as to rest their defence on the ground of privilege only. On demurrer to this plea, the Court of Queen's Bench supported Lord Denman's statement of the law.

Judgment of Patteson J.

The points for determination were clearly set forth in the judgment of Patteson J.

'First: Whether an action at law will lie in any case for any act whatever admitted to have been done by the order and authority of the House of Commons.

'Secondly: Whether a resolution of the House of Commons, declaring that it had power to do the act complained of, precludes this Court from inquiring into the legality of that act.

'Thirdly: If such resolution does not preclude the Court from inquiring, then whether the act complained of be legal or not.'

Order of House no defence to illegal act.

On the first point the learned judge had no difficulty in holding that, though no action could lie against a member of the House for things done in the House, yet that if the thing done was to make an illegal order, the privileges of the House would not shelter those who carried that illegal order into effect outside the House. Nor had he any hesitation in holding that, if the second question were answered in the negative, the act complained of was illegal.

Resolution of House no bar to inquiry by Court.

The bulk of his argument was addressed to the question whether the resolution of the House was a bar to inquiry by a Court of Law into the legality of the acts which it had ordered: in other words, Could the House prohibit the Courts, by resolution, from discussing the legality of any act which it might choose to command?

'Upon the whole, the true doctrine appears to me to be this: that every Court in which an action is brought upon a subject matter generally and prima facie within its jurisdiction, and in which, by the course of the proceedings in that action, the

powers and privileges and jurisdiction of another Court come into question, must of necessity determine as to the extent of those powers, privileges, and jurisdiction: that the decisions of that Court, whose powers, privileges, and jurisdiction are so brought into question, as to their extent, are authorities; and, if I may so say, evidences in law upon the subject, but not conclusive. In the present case, therefore, both upon principle and authority, I conceive that this Court is not precluded by the resolution of the House of Commons of May, 1837, from inquiring into the legality of the act complained of, although we are bound to treat that resolution with all possible respect, and not by any means to come to a decision contrary to that resolution, unless we find ourselves compelled to do so by the law of the land, gathered from the principles of the common law, so far as they are applicable to the case, and from the authority of decided cases, and the judgments of our predecessors, if any be found, which bear upon the question [1].'

The learned judge dwelt on the importance of maintaining all such privileges as are necessary for the protection of the House of Commons, but he distinguished the maintenance of these privileges from the assertion of 'the power of invading the rights of others'. The onus of showing the existence and legality of the power claimed lay upon the defendants, and he held that in this they had failed.

True nature of privilege.

The view entertained by the Court as to the nature of privilege is clear. It is a defensive and not an aggressive weapon lodged with the House, and, in order to justify its use for the purpose of legalizing a libel, more ample authority was required than the Attorney-General was able to produce.

Grounds of contention.

The character of the difficulties which arose between the House and the Courts is identical in each of these cases.

In *Ashby* v. *White* the Commons thought that if the Court of Queen's Bench tried an action brought by an elector against a returning officer for refusing to allow him to vote, their right to determine disputed returns was being infringed.

In *Stockdale* v. *Hansard*, they thought that if the same

[1] *Stockdale* v. *Hansard* 9 A. & E. 203.

Court tried an action for libellous matter contained in a report made to them pursuant to a Statute, and published by their order, their right to the regulation of their own proceedings was being infringed.

In each case, when the House became aware that the application of its privilege to the matter in hand conflicted with rules of law, it seems in an impulse of annoyance to have asserted a right to define its own privileges in such terms as to override rules of law.

In *Ashby* v. *White*, the House found itself in conflict with the jurisdiction in error of the House of Lords, and a prorogation alone could avert the collision of the two Houses. In *Stockdale* v. *Hansard*, the House found it prudent to concur in the passing of an Act, by which publications ordered by Parliament were protected from the law relating to defamation.

Bradlaugh v. Gosset.

It remains to consider a case in which there was no such conflict of jurisdictions as in the two to which we have just referred.

A resolution of the House of Commons, relating to matters confined within the walls of the House, was called in question, in *Bradlaugh* v. *Gosset*[1], and the issue raised was, on this occasion, free from all circumstances of irritation. It was stated with the utmost clearness by Stephen J.: 'Suppose that the House of Commons forbids one of its members to do that which an Act of Parliament requires him to do, and, in order to enforce its prohibition, directs its executive officer to exclude him from the House, by force if necessary—is such an order one which we can declare to be void, and restrain the executive officer of the House from carrying out?'

The distinction between the cases in which Courts of Law consider that the House is alone interested in the matter in hand and those in which rights external to the House are involved is very clearly furnished by the circumstances of the case; and in the judgment of Stephen J.

Relation of Courts to Privilege.

'A resolution of the House, permitting Mr. Bradlaugh to take his seat on making a statutory declaration, would certainly

[1] 12 Q. B. D. 281.

never have been interfered with by this Court. If we had been moved to declare it void and to restrain Mr. Bradlaugh from taking his seat until he had taken the oath, we should undoubtedly have refused to do so. On the other hand, if the House had resolved ever so decidedly that Mr. Bradlaugh was entitled to make the statutory declaration instead of taking the oath, *and had attempted by resolution or otherwise to protect him against an action for penalties*, it would have been our duty to disregard such a resolution, and, if an action for penalties were brought, to hear and determine it according to our own interpretation of the Statute. . . . We should have said that, for the purpose of determining a right to be exercised within the House itself, and in particular the right of sitting and voting, the House, and the House only, could interpret the Statute; *but that as regarded rights to be exercised out of and independently of the House, such as the right of suing for a penalty for having sat and voted, the Statute must be interpreted by this Court, independently of the House.*'

On the whole, it seems now to be clearly settled that the Courts will not be deterred from upholding private rights by the fact that questions of parliamentary privilege are involved in their maintenance; and that, except as regards the internal regulation of its proceedings by the House, Courts of Law will not hesitate to inquire into alleged privilege, as they would into local custom, and determine its extent and application.

Need grounds of commitment appear

2. But there is another point on which Courts of Law have come into contact with the House of Commons. It relates to the right of committal for contempt. The question is shortly this: whether, if a person, so committed, obtains a writ of *habeas corpus*, it is a sufficient return to the writ that the committal was by a warrant, issued in pursuance of an order of the House of Commons, when the warrant for committal did not specify any other grounds than contempt. In *Paty's*[1] case, in 1705, the Court of Queen's Bench held that it was sufficient return to a writ of *habeas corpus* that the prisoner was committed for contempt, although the contempt alleged was that Paty, one

[1] 2 Lord Raymond, 1105.

of those aggrieved by the conduct of the returning officers for Aylesbury, had brought an action against them, as in Ashby's case the Court had already held that he was entitled to do. Holt C. J. dissented from this judgment and, though he was in a minority, reasons will hereafter be given for thinking that his view was the correct one.

on a return to *habeas corpus?*

In *Murray's* [1] case (1751), the return to the writ alleged contempt simply, and the King's Bench held that 'it need not appear what the contempt was, for if it did appear we could not judge thereof'. Like law is laid down by Lord Ellenborough in the case of *Burdett* v. *Abbott* [2], and in the case of the *Sheriff of Middlesex* [3]; and the matter is put most clearly in the question laid before the judges by Lord Eldon, when *Burdett* v. *Abbott* [4] came before the House of Lords for decision. He asked them whether, if the Court of Common Pleas had committed for contempt, stating no other cause on the warrant, or the circumstances of the contempt, and the matter came before the Court of King's Bench on the return to a writ of *habeas corpus*, the latter Court 'would discharge the prisoner, because the particular facts and circumstances out of which the contempt arose were not set forth in the warrant'. The judges unanimously answered that it would not do so, and the House of Lords thereupon decided for the defendant.

The case of *Burdett* v. *Abbott* did not arise, like the previous cases, upon a return to a writ of *habeas corpus*, but in an action of trespass brought against the Speaker for causing the plaintiff's house to be broken and entered, and himself to be carried to the Tower and kept there. But it is clear that, whether or no the House of Commons is a court of record, not only has it the same power of protecting itself from insult by commitment for contempt, but the Superior Courts of Law have dealt with it in this matter as they would with one another, and have accepted as conclusive its statement that a contempt has been committed, without asking what that contempt may have been.

Cause of commitment need not appear,

If the alleged contempt be expressed in the warrant, it

[1] 2 Wils. 299.
[2] 14 East, 1.
[3] 11 Ad. & E. 809.
[4] 5 Dow. 199.

but if it does the Courts will consider its adequacy.

is possible that a Court of Law might consider the commitment on its merits. Thus, Lord Ellenborough, in *Burdett* v. *Abbott*, states the law:

'If a commitment appeared to be for a contempt of the House of Commons generally, I would neither in the case of that Court[1], nor of any other of the Superior Courts, inquire further; but if it did not profess to commit for contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the Court committing, but a ground of commitment palpably arbitrary, unjust, and contrary to every principle of natural justice; I say that in case of such a commitment . . . we must look at it and act upon it as justice may require, *from whatever Court it may profess to have proceeded*[2].'

And thus it is possible that the opinion of Holt C. J. in Paty's case may have been the better one, and that if a contempt were alleged to consist in the exercise of a legal right, a Court of Law might 'act upon it as justice may require'.

Beyond this however the Courts are not likely to go in the examination of the Speaker's warrant. It is regarded in the light of a mandate which issues 'from a superior Court acting according to the course of the Common Law', and differs in this respect from 'the warrants of magistrates or others acting by special statutory authority and out of the course of the Common Law'. Thus the warrant would be valid unless some obvious irregularity should appear upon the face of it[3].

Payment of Members.

It is not easy to find a place for this new addition to the rights of members of the House of Commons; by some it may not be regarded in the light of a privilege. Since the commencement of the financial year 1911–12, every member who is not in receipt of an official salary has received £400 a year, paid quarterly, and subject to income tax: and this

[1] It is noticeable that Lord Ellenborough uses the term 'Court' of the House of Commons. Probably the word must be understood in the limited sense in which it is used in *Fielding* v. *Thomas* [1896] A. C. 612.

[2] *Burdett* v. *Abbott*, 14 East, 150. [3] *Howard* v. *Gosset*, 10 Q. B. 359.

charge upon the taxpayer will come up every year as one of the votes in Supply.

These salaries differ from the wages which fell into disuse early in the seventeenth century: (1) the payment is made by the Exchequer and not by the constituency; and (2) there is no such condition as was imposed by 6 Hen. VIII, c. 16, that unless the member attend the House until the close of the Session wages should not be paid. 'The payment is made to and received by every member *virtute officii*. It does not vary with his pecuniary needs or with the expenses he must incur in fulfilling his duties or with the assiduity with which those duties are fulfilled. Indeed, it continues to be payable to him for periods during which he may be disqualified from sitting and voting and can have no duties to perform.' [1]

[1] Lord Parker in *Hollinshead* v. *Hazleton* [1916] 1 A. C. 428, 460 ff. See, however, *ante*, p. 166(*n.*). It was held in the case cited that under s. 51 of the Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58) the Court could order part of the salary to be appropriated for the benefit of creditors, and the argument that such appropriation would be against public policy was rejected. Under the Irish Bankruptcy Acts a bankrupt is not, as in England and Scotland, disqualified from election to Parliament, though he may become disqualified if adjudicated bankrupt while a member.

CHAPTER V

THE HOUSE OF LORDS

We have, so far, dealt with that part of the legislature which is brought into existence by popular election taking place in pursuance of writs of summons issued by the Crown. We now come to deal with that part which depends for its existence on royal writs addressed to its individual members.

Peerage not identical with Lords of Parliament.

But we are apt to speak of the Lords of Parliament or of the House of Lords as though these were convertible terms with the Peerage, forgetting that the political functions and privileges of a peer who is also a Lord of Parliament are not summed up in his right to a place in an hereditary legislative body, and that the Peerage is not conterminous with the House of Lords.

Lords of Parliament who are not Peers.

That the Peerage and the House of Lords do not mean the same thing is easily shown. For it would seem to be of the essence of the Peerage that it should carry with it hereditary right [1]; such hereditary right is wanting not only to the Bishops but also to the Lords of Appeal, yet Bishops and Lords of Appeal are entitled to be summoned to the House of Lords.

Peers who are not Lords of Parliament.

Again, the peerage before the Union with Scotland was the peerage of the realm of England: after the Union it became the peerage of the kingdom of Great Britain [2], but as many of the peers of Great Britain as were such in virtue of being peers of Scotland did not become Lords of Parliament unless they were in the number of the sixteen representative peers. After the Union with Ireland the peerage became that of the United Kingdom of Great Britain and Ireland, but again such as belonged to this body as peers of Ireland did not become Lords of Parlia-

[1] A peerage is, in law, an incorporeal hereditament, 'an inheritance'. Palmer, Peerage Law in England, p. 4, and see authorities there cited.

[2] 6 Anne, c. 11, Art. 23.

ment unless they were in the number of the twenty-eight representative peers [1].

It follows therefore that there are Lords of Parliament who are not Peers, and Peers who are not Lords of Parliament. There are certain functions and attributes common to Peers who are Lords of Parliament and to Peers who are not. These may be distinguished in the Lords' Report on the dignity of a Peer, where peers are described :—' First as possessing individually titles of honour giving them respectively rank and precedence ; secondly, as being individually hereditary counsellors of the Crown ; thirdly, as being collectively (together with the Spiritual Lords), when not assembled in Parliament, the permanent council of the Crown ; fourthly, as being also collectively (together with the Spiritual Lords), *when assembled in Parliament*, a Court of Judicature ; and fifthly, as having for a long time formed with the Commons, *when convened in Parliament*, the Legislative Assembly of the kingdom by whose advice, consent and authority, with the sanction of the Crown, all laws have been made [2].'

Functions of Peerage.

It would appear then that there are certain privileges and duties of peers which are distinct from those of a Lord of Parliament. Those which appertain to them as Counsellors of the Crown or as a Court of judicature are more properly dealt with elsewhere [3]. Others may be considered here ; but first let us ask, of what persons does the House of Lords consist ? Can we classify the Lords of Parliament ?

There are five kinds of qualification for membership of the House of Lords, and the ' Lords Spiritual and Temporal ' consist of—

Qualifications for House of Lords.

(1) Hereditary peers of the United Kingdom :

(2) Hereditary peers who are not hereditary Lords of Parliament—

(*a*) The 16 representative peers of Scotland elected for each Parliament,

[1] 39 & 40 Geo. 3, c. 67, Article iv.

[2] Lords' First Report on Dignity of a Peer, p. 14.

[3] The Crown, vol. i, chap. ii ; vol. ii, chap. x.

(*b*) The 28 representative peers of Ireland elected for life[1]:

(3) Lords who are Lords of Parliament during their lives but transmit no rights, whether as peers or as Lords of Parliament, to their heirs—

(*a*) The 26 lords spiritual,

(*b*) The lords of appeal.

Of these, the lords spiritual hold their place as Lords of Parliament, conditionally on the discharge of episcopal duties. A bishop who resigns his bishopric ceases to be a Lord of Parliament, though he retains rank and precedence[2]. The same rule applied to the Lords of Appeal and their discharge of judicial functions before 1887; but they now hold their place in Parliament for life[3].

§ 1. *The Baronage as an estate of the realm.*

Origin of baronage.

Such is the present constitution of the House of Lords. But it is necessary to ask not only how these different kinds of qualification arose, but how the entire body of the House comes to exist as an independent branch of the legislature.

The Witan of the Saxon kings comprised, at any rate, the earls and bishops. The temporal office of the one, the spiritual office of the other, conferred a right to be present at the great council of the realm. After the Norman Conquest the earl lost, to a great extent, his official position.

Feudalizing of great Council.

Nor did the bishop any longer hold his lands free of all but spiritual service. In the words of Dr. Stubbs, 'the earldoms became fiefs instead of magistracies, and even the bishops had to accept the status of barons[4].' Attendance at the King's court became a liability rather than a right, a liability arising out of tenure. We can consider later whether the bishop is summoned in right of his spiritual office or on the liability of his temporal barony.

The Norman baronage.

The earls created after the Conquest were few: nor was it the policy of the Norman and Angevin kings to retain

[1] It is not known whether the position of Irish representative peers will be in any way affected by the Irish Agreement of December 6, 1921.

[2] 32 & 33 Vict c. 111, s. 5.

[3] 50 & 51 Vict c. 70, s. 2.

[4] Const. Hist. i. (5th ed.) 293.

the great territorial offices of the Anglo-Saxon kingdom. But when the baronage appears in the reign of Edward I, as an estate of the realm summoned in a special form to a deliberative assembly distinct from the Commons, it consisted of many persons besides earls and bishops, and we are met by the difficulty of ascertaining how this body was constituted and what were its distinctive characteristics.

The *majores barones* of the Charter.

When John promised that he would never exact any aid other than the three feudal aids, *nisi per commune consilium regni*, the persons who were described as entitled to be present at the council were the tenants in chief of the Crown. The assembly was divided into two groups, and of one group each member received a special summons. Some members of this group are easily distinguishable from all the members of the other: the archbishops, bishops, abbots and earls. Besides these come the 'majores barones', and where all alike depended for their right to be present on holding lands of the Crown, it is not easy to say what constituted the difference between the *majores barones* specially summoned and the *minores barones* and other tenants in chief summoned 'in generali.' It may have been greater extent of possessions, or greater political influence, or a longer line of descent.

So far as the assembly of John is concerned its only importance to us lies in the conclusion to which it leads us, that, since the right to be present depended in all cases upon tenure, the distinction between the *majores barones* and the *minores barones* could not have rested on the fact that the former held of the Crown.

The baronage of Edward I.

This conclusion is important when we ask what gave a right of summons to the meetings of the King's Council in Parliament in the constitution of Edward I. The right of representation in the Parliament of 1295 most certainly did not in the case of the Commons depend upon the holding of lands of the Crown. Did then the right of summons depend in the case of the magnates upon such holding? Or the question may be put in this way: Apart from the earls and bishops, were those who were summoned limited to such persons as held of the Crown on baronial tenure, and did such tenure confer a right to be summoned? There are in fact three possibilities as to the relation of the estate of the

baronage to tenure. The King might have been bound to summon all who held of him '*per baroniam*', and none other: he might have been free to select for summons whom he chose within the limits of those who held lands of him either *per baroniam* or on some other tenure; or his discretion as to the summons might have been unrestricted by the requirement of tenure.

Tenure *per baroniam* gave no right of summons.

We may dismiss the first of these three possibilities. There seems to be no doubt that the particular holding which carried with it the feudal obligations of a barony, the holding of thirteen knights' fees and a third, did not place the holder among the *majores barones*, nor did it confer the right to be summoned to Parliament. The Committee of the House of Lords appointed in 1819 to inquire into 'all matters touching the Dignity of a Peer of the Realm' came to a decided conclusion that many who were in possession of baronies in the technical sense of holding *per baroniam* were not summoned by Edward I[1].

Was it a condition of summons?

The second question, whether the discretion of the King as to summons was or was not limited to those who held of himself, *per baroniam* or otherwise, admits of some doubt.

The case of Thomas Furnival illustrates this point as to the character of the tenure. It was not necessary that the person summoned should hold as by barony. Thomas Furnival was amerced for lands held of the King, as by barony. He alleged that he did not hold his lands on such tenure. On inquisition made by order of the Exchequer it was found that he held the lands on account of which he was amerced, and that he held of the King 'but not by barony[2].' He was undoubtedly summoned, by writ, to Parliament before and after this contention[3].

[1] 'Henry the Third is reported to have reckoned that above two hundred properties, denominated Baronies, existed in his time; the remaining records afford proof of the existence of a very large number of such Baronies, and except in the instances already mentioned, there appears to have been no claim of a seat in Parliament in respect of such Baronies.' Third Report on the Dignity of a Peer, p. 242.

[2] 19 Ed. II; Madox, History of the Exchequer, ch. 14, s. ii. *ad fin.*; and see Pike, Hist. of House of Lords, 235–6.

[3] See the lists of persons summoned to the Parliaments of Edward II and Edward III in the Appendix to the Report on the Dignity of a Peer.

Conflicting opinions.

But it is not so easy to ascertain whether in the thirteenth and fourteenth centuries persons were summoned who did not hold of the King at all[1].

The Report on the Dignity of a Peer suggests that tenure was not a condition precedent to summons[2], but the case of Warine de L'Isle, who held a barony of a mesne Lord and yet was summoned to Parliament, is the only authority for the suggestion, and the case was regarded at the time as exceptional.

In the course of the reign of Edward III an alteration took place in the wording of the writ of summons which may indicate a change in the conditions of summons. The peer was bidden to attend—not *in fide et homagio*, but—*in fide et ligeantia*. This change did not take place at once. The words *homagium* and *ligeantia* were used, sometimes one, sometimes another, sometimes both, indiscriminately from 1348 to 1373, after which latter date the peer was regularly summoned *on his faith and allegiance*.

Baronage ultimately defined by summons.

One cannot safely say more than this: Tenure of the Crown by barony created a liability though it did not give a right to a writ of summons; but it is not easy to fix an approximate date at which the summons came to be independent of tenure. Whether or no the King uniformly or habitually confined his summons to such as held of himself, the estate of the baronage was ultimately constituted and defined, not by conditions of birth or of tenure, but by the exercise of the royal prerogative in issuing the writ of summons.

Hereditary right, how acquired.

It does not appear that in the thirteenth century or for some time later a writ of summons issued to a particular baron was regarded as necessarily entitling him to receive the writ on all future occasions; still less that his heirs thereby become entitled to receive writs of summons after their ancestor's death. But the intimate connexion between the liability to be summoned and the tenure of land, combined with the practice of strict entail, tended to promote the conception of an hereditary right, and the list of the

[1] Hallam, Middle Ages, (1877), 561; Stubbs, Const. Hist. ii. (5th ed.) 186.

[2] Report, p. 243; and see Pike, Const. Hist. of House of Lords, 117.

greater barons to whom it was customary to issue writs gradually became stereotyped. Richard II was the first to create a baron by letters patent, and it may be that the reason for this innovation was that the prerogative of the Crown with regard to its choice of counsellors was felt to have become unduly limited [1].

The date from which a writ of summons operated so as to confer an hereditary right has been variously stated. Lord Redesdale in the L'Isle case would fix it at the fifth year of the reign of Richard II; he regards the rule as settled by the statute 5 Ric. II, st. 2, c. 4, which Lord Coke interprets, and seemingly with good ground for so doing, to be merely declaratory of existing practice [2]. Mr. Hallam would place it later [3]. Bishop Stubbs tells us that it is convenient to adopt the year 1295 as the era from which the baron whose ancestor has once been summoned and has once sat in Parliament can claim an hereditary right to be so summoned [4]. Professor Freeman thinks (and it would seem, with justice) that Dr. Stubbs fixes the date a little too rigidly, but holds that after 1295—

> 'The tendency is to the perpetual summons, to the hereditary summons; from that time anything else gradually becomes exceptional; things had reached a point when the lawyers were sure before long to lay down the rule that a single summons implied a perpetual and an hereditary summons [5].'

There is, however, a wide divergence between historical fact and peerage law. The early kings who summoned barons to their Parliaments may not have had, and almost certainly did not have, the intention of creating thereby what we now know as an hereditary peerage; but centuries later the House of Lords decided (what is now the law) that proof of the receipt of a writ of summons to a Parliament

[1] Pollard, Evolution of Parliament, p. 103.

[2] Report of proceedings on claim to the barony of L'Isle, ed. Nicolas, p. 200. Mr. Pike, Const. Hist. of House of Lords, pp. 94–100, seems to agree, as to dates, with Lord Redesdale rather than with Dr. Stubbs.

[3] Hallam, Middle Ages, (1877), 563.

[4] Const. Hist. ii. (5th ed.) 192.

[5] Encyclopaedia Britannica, Tit. *Peerage*.

and a sitting in Parliament in virtue thereof operated to confer an hereditary peerage on the person so summoned, even though no proof might be forthcoming of any subsequent writ addressed to him or to his descendants.

It will be remembered that in the thirteenth and fourteenth centuries the writ of summons was to a meeting of the King's Council in Parliament. An able and powerful King such as Edward I no doubt summoned only those of his barons whose advice and counsel were likely to be of value to him; but in the troubled times of his successor the magnates were stronger than the King and asserted their right to control the Council, and, through the Council, the King himself. It is from this period that we may date the gradual disappearance from Parliament of the Council's professional elements, the judges, the barons of the Exchequer, and others, who became advisers only, without a vote. The King's Council in Parliament thus became a Council of magnates, and, with the growth of the hereditary principle, assumed the character of a chamber of hereditary counsellors, a House of Lords such as we know it to-day.

§ 2. *Legal difficulties in defining the estate of the Baronage.*

Difficulties from mode of creation

We may say that from 1295 onwards the general rule obtained that the Parliamentary baron acquired his rank and his right to vote by writ of summons followed by the taking of his seat. An earldom was an office as well as a dignity[1] and an earl was created by formal investiture with the sword, frequently in Parliament, and he received a charter, or later letters patent, declaring the dignity conferred upon him and limiting its devolution. As the other ranks of the peerage were called into existence the grant was in like manner evidenced by charter or patent. Richard II conferred a barony in this manner. The practice was not repeated in the case of baronies until the reign of Henry VI, but thenceforth it became the usual mode of creating Parliamentary baronies as well as other ranks in the peerage,

[1] *Earldom of Norfolk Peerage Claim* [1907] A.C. 10, 12.

and tended greatly to simplify questions which from time to time arose as to the rights to disputed peerages.

from connexion with tenure.

For the patent was evidence of title and indicated the line in which the peerage was to descend, usually to the heirs male of body of the grantee; while the titles of baronies which depended upon the writ of summons were complicated, not merely by the greater difficulty of proof, and by the fact that they passed to heirs lineal, and were not limited to the male line, but undoubtedly by the fact that for a long time an impression prevailed that they were connected with the holding of land, and hence that they might be dealt with like so much landed property[1].

From this connexion, right or wrong, of barony with tenure some curious results arose.

Alienation of baronies.

Prynne tells us[2], but without giving much authority for the statement, that baronies by tenure were alienated by sales and gifts 'so as to confer the right of summons on the new owner'. It may not be easy to find proof of Prynne's assertion, but at any rate there seems no doubt that holders of baronies exercised a power of limitation so as to exclude heirs general in favour of a particular line of descent. Thus William Baron Berkeley in the reign of Henry VII, having barred the entail of the castle, lands and other hereditaments, including, as was considered at the time, the Parliamentary barony, settled the same on King Henry VII, in tail male with remainder to his own right heirs; the Parliamentary barony thereupon remained in abeyance until the death of Edward VI, when the heirs male of Henry VII failed and the remainder took effect in favour of the great-grandson of William's brother, who was then summoned to Parliament in right of the barony.

Tenancy by the curtesy.

Again, until the end of the sixteenth century a commoner marrying a baroness in her own right became entitled to a writ of summons during her life[3]. Henry VIII thought

[1] We may note the effect, in confirming the idea that baronies were by tenure, of the position of the abbots who asked to be excused attendance on the ground that they did not hold baronies in the sense of land baronies. Stubbs, Const. Hist. iii. (5th ed.) 459.

[2] Brief Register, p. 239.

[3] Lord Burghley gives a list of 20 barons of Parliament 'that have

it objectionable that 'a dignity should shift from the husband on the death of the wife [1],' and, in a case where a man claimed a dignity in right of his wife, laid down the rule that unless there was issue of the marriage, so as to make the husband a tenant by curtesy of England, he should not enjoy his wife's dignity. The right was thus narrowed, but until the *Willoughby* [2] case (1580) it was held that a tenancy by the curtesy in a peerage existed during the lifetime of the father to the exclusion of the eldest son, though of age [3].

Surrender of baronies.

The surrender of a barony to the Crown by the process of levying a fine suggests the connexion of the right or liability to be summoned to Parliament with the tenure of an estate. The surrenders of peerages which took place before the seventeenth century appear to have been surrenders either of earldoms which had the character of offices, or of peerages created by letters patent which might be returned to the Chancery whence they came. In the year 1640 a fine had been levied of a barony which was created not by letters patent but by writ, and the fine was held good.

These practices have ceased to be lawful in consequence of the gradual definition and establishment of custom by a series of resolutions or decisions of the House of Lords on disputed peerages. In the words of Lord Campbell, 'It is now fully settled that the law of the peerage of England depends entirely upon usage, both as to the power of the Crown and as to any claim that may be made by a subject [4].'

Effect of seventeenth-century decisions.

The seventeenth century—and especially the latter part of the seventeenth century—may be looked upon as the period when the customs of the peerage were defined and reduced to the form in which they appear in modern text-

attained their baronies by their wives': Hatfield MSS. iii. 826 (March 6, 1588).

[1] Collins, p. 11, and see Pike, Const. Hist. of House of Lords, p. 107.

[2] Ibid., p. 23.

[3] See Cruise on Dignities, and the cases there collected, pp. 106, 108.

[4] 8 H. L. C. 79. The rule as to surrender is described more concisely by Mr. Pike as 'Lord-made law of comparatively recent growth.'

books. And this was done by resolutions of the House passed upon cases referred to it for consideration by the Crown, or passed independently of such reference.

Peerage cannot be surrendered:

Thus in 1640 the House resolved in general terms that a peerage could not be alienated or transferred to another nor surrendered to the Crown. In the *Purbeck* case[1] in 1678 the House definitely held that a particular peerage could not be surrendered, nor the peer divest himself of his barony by the process of suffering a fine[2].

must originate in writ or patent

In 1640 it was held in the *Ruthyn* case[3] that title to a peerage must originate in matter of record; that is, by writ or by a succession of writs or by patent. Such a decision would mean that the House would not accept the fact of the seat having been taken, or a ceremonial having been passed through, unless supported by documentary evidence of a certain sort.

writ creates hereditary peerage,

In 1673 it was held in the *Clifton*[4] case that a man to whom a writ of summons is issued, and who in pursuance thereof takes his seat in Parliament, acquires thereby an hereditary peerage.

after seat taken.

In 1677 comes the important decision in the case of the barony of *Freschville*[5], that a Parliamentary barony is not constituted by the mere receipt of a writ of summons nor is the blood of the holder ennobled thereby. Proof must be given that the summons was obeyed and the seat taken in order to perfect the title to the barony.

Nineteenth-century cases.

How gradual has been the definition of the rights of the peerage, and of the Crown in relation to the peerage, is shown by the cases which have arisen in the nineteenth and present centuries. The right of the Crown to create a life peer with a right to sit and vote as a Lord of Parliament was not definitely negatived till 1858[6], nor the right

[1] Collins, 306, and Lords' Rep. iii. 26.

[2] Lords' Rep. iii. 25, and see Collins, 301; *Earldom of Norfolk Peerage Claim* [1907] A. C. 10. The contention that a peer may evade the disabilities, without surrendering the rights, of a peerage and may continue to sit in the House of Commons if he refrains from asking for a writ of summons, might be regarded as an attempt at partial surrender. The attempt failed. *Ante*, p. 83.

[3] Collins, 256.

[4] Ibid., 292.

[5] Lords' Rep. iii. 2

[6] 140 Hansard, 3rd ser. 330.

to create peerages with limitations unknown to the Common Law until 1876 [1]. The right of the subject to claim a summons in virtue of holding certain lands, that is, to transfer a so-called barony by tenure, was settled adversely in 1861 [2], as was the right to surrender a peerage in 1907 [3].

So far an attempt has been made to show how the baronage came to be an estate of the realm and a separate House of Parliament.

We now come to consider:—What are the limits on the right of the Crown to create peers;—what are the limits on the right of the Crown to summon peers;—what disqualifications may prevent a peer, duly created and properly summoned, from sitting and voting;—what there is individual or characteristic about the mode of creation or of summons in the case of each of the classes of peers enumerated on a preceding page;—what are the privileges of the House collectively or of its members individually.

§ 3. *Real or supposed restrictions on Creation.*

The restrictions on the right of the King to create peers are partly statutory, partly to be found in a series of decisions which determine the nature of the estate which the Crown may create in a dignity carrying with it the right to sit and vote as a Peer of Parliament.

The statutory limitations are imposed by the Acts of Union.

Limitations in Acts of Union.

The Act of Union with Scotland provides that the peerage of Scotland shall after that Act be the peerage of Great Britain, and makes no provision for any increase of the Scotch peerage, or for the maintenance of its numbers at their then existing figure. It would follow that if the King made a new peer of Scotland he would not be admitted to vote at the election of Scotch representative peers. Indeed an Act of 1847 [4] takes away the right to vote in respect of any peerage in virtue of which the vote has not been exercised since 1800.

Scotch peers.

Irish peers.

The Act of Union with Ireland provides that the Crown

[1] L. R. 2 App. Ca. 21. [2] 8 H. L. C. 81. [3] [1907] A. C. 10.
[4] Representative Peers (Scotland) Act, 1847 (10 & 11 Vict. c. 52).

may make one peer of Ireland for every three that become extinct after the Union until the number fall to 100, and that the number of Irish peers not entitled by the possession of other peerages to an hereditary seat in the House of Lords of the United Kingdom may be retained at that number by fresh creations if the King so please.

Fresh creations.

The Crown therefore cannot create a peer of Scotland; and can only create a peer of Ireland under the circumstances defined in the Act of Union with Ireland.

We now come to what may be described as the Common Law restrictions on the right of creation.

A peerage cannot be surrendered to the King,

(*a*) The King cannot accept a surrender of a peerage once granted, and therefore cannot grant afresh a peerage the holder of which has gone through the form of surrender. That a peerage cannot be surrendered seems to have been a matter settled by judicial opinion and resolutions of the Lords based thereon in the seventeenth century. The opinion of Dodridge J. in the case of the earldom of Oxford [1] was adopted by the House in the *Grey de Ruthyn* case in 1640, when the House resolved that:—

'No peer of the realm can drown or extinguish his honour (but that it descends to his descendants), neither by surrender, grant, fine, nor any other conveyance to the King [2].'

re-granted after surrender invalid.

This resolution was acted on in the *Purbeck* case [3] in 1678, and the law seems to have remained unquestioned until very lately when the earldom of Norfolk was claimed by Lord Mowbray on the ground of a surrender of the earldom by Roger le Bygod to Edward I in 1302, and a re-grant by Edward II of the same earldom to Thomas de Brotherton, by charter, in 1312. Lord Mowbray satisfactorily proved his descent from Thomas de Brotherton, but the Committee for Privileges, to whom the case was referred, reported that the claim was not established because the original surrender was invalid.[4] Their Lord-

[1] Collins, 190. [2] Ibid., 256. [3] Ibid., 293.

[4] [1907] A. C. 10. Brotherton had been summoned and had taken his seat, but this apart from patent or charter, could confer no more than

ships took the law to be settled by the Purbeck case and held that the law thus settled had always been the law on the subject, although such a surrender might, erroneously, have been regarded as valid in the thirteenth and fourteenth centuries [1].

Rules of descent must be followed.

(*b*) The King cannot create a peerage with limitations which involve a variation from the ordinary law of the country with regard to descent [2]. This has not always been regarded as settled law.

Devon case.

In the *Devon* peerage case [3] (1831) it was held that a grant of an earldom made to a man and *his heirs male* was good, a grant differing from an estate tail in the absence of words of procreation and from an estate in fee by reason of the restriction as to sex. In the *Wiltes* claim of peerage [4] it was held that a similar grant was bad. There were other reasons for holding that the claimant in the Wiltes case could not sustain his claim, for William le Scrope the first Earl of Wiltes was alleged to have forfeited his earldom, upon his execution, in the troubles which ended in the dethronement of Richard II. But Lord Chelmsford was clearly of opinion that the grant was bad. He asks—

Wiltes case.

'Whether it is competent to the Crown to give to a dignity a descendible quality unknown to the law, and thereby to introduce a new species of inheritance and succession?' and adds, 'the question put in this way seems to answer itself. The Crown can have no such power unless there is something so peculiar in a dignity, so entirely within the province of the Crown to mould at its pleasure, that a limitation void as to every other subject of grant is good and valid in the creation of a peerage. No one has pushed the argument to this extravagant length.'

Differences of opinion.

It should be observed that the law as laid down by Lord Chelmsford in the Wiltes case differed not only from that

a barony, and the claim was for an earldom, and the charter, on which the title to summons was based, was held to be invalid.

[1] On 26th Nov. 1919, the House of Commons (by 169 to 56) refused leave to bring in a bill enabling the Crown to accept the surrender of a peerage: 174 Commons Journ. 376.

[2] *Per* Lord Cairns, L. R. 2 App. Ca. 20.

[3] 2 Dow & Cl. 200.

[4] L. R. 4 H. L. 126.

on which a Committee of Privileges had founded its conclusions in the *Devon* case, but was at variance with the opinions of two such eminent authorities as Coke and Cruise. Coke says that a writ of summons confers on the person summoned 'a fee simple in the barony without words of inheritance.' But he qualifies this statement almost immediately by saying that 'the writ hath no operation until he sit in Parliament and thereby his blood is ennobled *to him and his heirs lineal*[1].' Cruise commenting on these *dicta* of Coke says, 'a person having a dignity by writ is not tenant in fee simple of it, for in that case *it would descend to heirs general*, whether lineal or collateral, of the person last seised; whereas a dignity of this description is only inheritable by such heirs as are lineally descended from the person first summoned to Parliament and not to any other heirs. It is in fact a species of estate not known to the law in any other instance except that of an office of honour[2].'

Committees of Privileges do not consider themselves bound by previous resolutions of similar Committees, and the resolution in the Devon Peerage case, together with the opinions of the learned writers just cited, might have been thought to counterbalance the conclusions of the *Wiltes* peerage case, but for a later decision of the same character in the *Buckhurst* peerage[3] case. The barony of Buckhurst, created in 1864, was granted by patent to the Countess of De la Warr for her life with limitations over to her second and every other son in tail male. But towards the close of the patent a proviso was introduced to the effect that whenever the earldom of De la Warr and the barony of Buckhurst devolved upon the same person, the barony should shift over to the person who would be next entitled to succeed thereto if the person succeeding to the earldom were dead without issue.

The Buckhurst case.

Lord Cairns pointed out that the patent proposed to deal with a peerage as a shifting use, that such shifting of an

The law settled.

[1] Co. Litt. [16. b] and see [9. b]

[2] Cruise on Dignities (1810), p. 100, and see Pike, Const. Hist. of the House of Lords, 124.

[3] 2 App. Ca. 1.

estate could only take place by virtue of the Statute of Uses, which turned uses into legal estates and which could have no application to peerages, because a peerage could not be held to the use of, or in trust for, another. He then asked whether such a course of descent as the grant prescribed was possible at Common law, and holding, as indeed was clear, that it was not possible, he pronounced against the claim on the ground stated earlier in his judgment that 'a peerage, partaking of the qualities of real estate, must be made in its limitation by the Crown, so far as it is descendible, descendible in a course known to the law[1].'

Baronies in abeyance.

We may here refer to the 'abeyance' of peerages. A barony by writ descends to heirs general. Hence, if a baron created by writ dies leaving no male heir, his daughter, if he has but one, succeeds as a peeress in her own right; but if there are more than one, the barony descends to all the daughters as co-heirs, as to co-parceners, and is then said to go into abeyance among them and their descendants, until the abeyance is terminated by the Crown in favour of one co-heir or until in process of time the peerage becomes vested in a single descendant of the last holder. The doctrine does not apply in the case of peerages created by letters patent, which invariably contain a limitation to the heirs male of the body of the grantee, though a special remainder is sometimes added to take effect as a new grant after the original limitation has come to an end.

Baronies by tenure.

It remains to consider the vexed question of baronies by tenure, which, if they could be held to exist, would encroach upon the exclusive prerogative of the Crown to summon whom it will to its Councils and to the Lords' House of Parliament. But the question has been settled adversely to the existence of such baronies.

Berkeley case,

The Berkeley peerage case came to be decided in 1861[2], upon a reference by the Crown to the House of Lords of a petition of Sir Maurice Berkeley to the Queen to be declared Baron of Berkeley and to receive a writ of summons to Parliament.

grounds of claim.

The ground of the petition was that Sir Maurice was for

[1] *Buckhurst Peerage case*, L. R. 2 App. Ca. pp. 29 and 20. [2] 8 H. L. C. 21.

the time being entitled to the castle and lands constituting what had been the territorial barony of Berkeley; and it may be said shortly, that in order to prove his case the petitioner had to show, first, that the right to a writ of summons had shifted with the right to the castle and lands of Berkeley, and secondly, that it had shifted in such a way as to make a precedent for the disposition by will of a barony by tenure.

As to the first point the petitioner was able to make out a case. There were two settlements of the castle and territorial barony of Berkeley by which it might be alleged that the Parliamentary barony had been allowed to pass to the person for the time entitled under the settlement.

First settlement of barony.

Of these settlements the first took place in the reign of Edward III, when Thomas, Lord Berkeley, with licence from the Crown, settled the castle and lands constituting the territorial barony upon himself for life with remainder to his son Maurice in tail male. The result of this settlement was that when, in the third generation, male heirs failed in the direct line of descent, not only the lands but the writ of summons to Parliament went out of the direct line to the nearest male heir [1]. There seemed no doubt that this was a genuine exercise of a right to direct the devolution of a barony by tenure, and that the baron, summoned as just described, was recognized by the House of Lords as entitled to the same precedence as though he had been in the direct line of descent.

Second settlement.

The second settlement was more doubtful in its application to the matter in dispute. William Lord Berkeley, in the reign of Henry VII, having barred the entail above described by suffering a fine, settled the territorial barony upon the heirs of his body, with remainder to Henry VII, and the heirs of his body, with a reversion to his own right heirs. William died childless, and his lands passed under the settlement to Henry VII, and his brother Maurice was

[1] Maurice left sons of whom the eldest, Thomas, took the barony, but on his death left an only daughter who was excluded from the succession by the entail. The barony passed to James, the nephew of Thomas and eldest grandson of Maurice, and this James was regularly summoned until his death in 1463.

never summoned to Parliament. When Edward VI died childless the reversion fell in, and Maurice's great-grandson acquired the property and was summoned to Parliament, taking the precedence due to the ancient barony. But in the meantime, though Maurice Berkeley was never summoned to Parliament, his son Maurice was summoned, yet only as junior baron, and he never obtained the high precedence due to the old Berkeley barony. When Maurice died childless his brother Thomas was summoned, and on the death of Thomas, his son, also named Thomas, was summoned, and this last enjoyed the precedence of the old barony. Shortly before his death the reversion had fallen in by the death of Edward VI, and Thomas's son Henry obtained the Berkeley lands as well as the Berkeley peerage.

Upon these facts it seems open to question whether the Parliamentary barony was not recognized, with or without the precedence due to it, as vested in the heirs of William the settlor, during some part of the time that the territorial barony was vested in the Crown.

Why insufficient proof.

These two settlements made the strength of the claimant's case, because they afforded proof that a dealing with the castle of Berkeley affected the right of summons to Parliament. In consequence of the first, the right of summons had followed the castle out of the direct line of descent. In consequence of the second, the writ of summons had, at any rate for a time, ceased to be issued while the castle was vested in the Crown.

They were by deed and with licence;

But the inadequacy of these settlements to establish the claimant's case arose from the fact that in each case the settlement was made by deed and with licence from the Crown, whereas the claim set up rested on a devise of the castle by will. The claimant had therefore to contend that modes of dealing with land unknown to the law at the date of the last settlement on which his case rested were applicable to baronies by tenure.

but the claim rested on a devise.

For since his claim rested on a devise, and since wills of land were not valid at the date of the last settlement which was used to prove a right to deal with the barony by the holder, the claimant, in order to establish his case, was

obliged to assume that a barony by tenure, if it existed at all, was susceptible of the widest exercise of rights of alienation and disposition, rights which had come into existence at a later date than any precedent which he could allege. He could make no use of the saving clause in the Act 'for taking away tenures *in capite* and by knight's service[1],' wherein it was provided that nothing in that Act should 'hurt any title of honour, feudal or other, by which any person hath or may have right to sit in the Lords' House of Parliament': for it was impossible for him to prove that any one had ever acquired such a right by devise.

The results of a decision in favour of the claimant would certainly have been startling; for he asserted, in the case of baronies by tenure, the existence of a right—

'By which a peer, of his own authority and according to his own caprice, might transfer the peerage to a stranger, might confer a privilege on this stranger to demand a summons from the Sovereign to sit in the great council of the realm, and might compel the unwilling sovereign to receive the homage of a peer so created[2].'

The decision of the House of Lords coincided with the opinion given by the judges consulted in the *Fitzwalter* case, where—

'The nature of a barony by tenure having been discoursed, it was found that baronies by tenure had been discontinued many years and were not then in being, and so not fit to be revived or to admit any pretence or right of succession thereupon, and that the pretence of a barony by tenure was therefore not to be insisted on[3].'

Summary. The King, then, has the exclusive prerogative of creating peers, and can do so at will, subject only to the restrictions (1) that he cannot create a peer of Scotland; (2) that he can only create a peer of Ireland under circumstances defined in the Act of Union with Ireland; and (3) that in directing the devolution of a dignity he is confined to limitations recognized by law in the case of other grants of real estate.

[1] 12 Car. II. c. 24, s. 11.

[2] Per Lord Campbell, 8 H. L. C. 81.

[3] Collins, 287.

Beyond these restrictions the King's powers are unlimited : but it would not be right to leave this part of the subject without noting a proposal made in the year 1719 to confine within very narrow limits the creation of new peers. The Peerage Bill, 1719.

The Peerage Bill of Lord Sunderland would have closed the House of Lords to any increase in its numbers beyond six. The King was to be allowed to make six new peers ; after which, new creations were only to take place on the extinction of existing peerages. The Scotch peerage was to be represented by twenty-five hereditary peers, which number was to be maintained by reinforcement from the remaining peers of Scotland as occasion required. The bill was rejected, and its provisions are matter of history. The successful attempt of Anne and her ministers in 1711 to pack the House of Lords by the creation of twelve new peers, and so to secure a majority for the Parliamentary approval of the Peace of Utrecht, was probably the ground of this venturesome proposal. It may not be much more venturesome to surmise that, if the ranks of the House of Lords had been closed in 1719, the House itself would hardly have been in existence with its present powers and privileges at the present day.

§ 4. *Restrictions on Summons.*

For our purposes, which are mainly to consider the House of Lords, and not the Peerage generally, the limits upon the Crown's rights of summons are more important than the limits upon its right to confer the Dignity of the Peerage. We will deal with all that exist or have been suggested with such comment or explanation as may appear to be necessary.

1. *Tenure.* Enough has been said on this point to show the character of the suggested limitation and the grounds on which, in the Berkeley peerage case, it was held not to exist. If baronies by tenure existed now they must be held with all the modern freedom of alienation and disposition, and the subject might therefore by sale or gift constrain the Crown to summon to its Councils and Parliament the Tenure.

man whom he might procure as his purchaser or select as his donee.

The historical uncertainty as to the existence of such baronies, and the practical absurdities which would follow from their existence, combine to lead to the conclusion that, at any rate, in the language of the judges in the Fitzwalter case, they are 'not fit to be revived.'

Scotch and Irish Peers.

2. *Scotch and Irish Peers.* Reference has already been made to the restrictions which are set upon the power of the Crown to create peerages of Scotland and Ireland. There are further restrictions upon its power to summon peers of Scotland and Ireland to sit and vote in the House of Lords.

Restrictions imposed by Acts of Union:

The Act of Union with Scotland conferred upon all Scotch peers the same privileges as were enjoyed by the peers of Great Britain. The Act of Union with Ireland conferred upon all Irish peers the same privileges as were enjoyed by the peers of the United Kingdom of Great Britain and Ireland. But in each case the right to sit in the House of Lords otherwise than as representative peers under the conditions of their respective Acts of Union was excepted from these privileges.

formerly by resolution of House of Lords,

So jealously was this exception guarded by the House of Lords that throughout the greater part of the eighteenth century it was maintained that the Crown could not confer upon a peer of Scotland a peerage of Great Britain which would entitle him to a writ of summons. The House came to this resolution in 1711, without reference from the Crown, in the case of the Duke of Hamilton (of the Peerage of Scotland), who claimed a seat as having been created Duke of Brandon in England[1]. This resolution was affirmed in 1719 in the case of the Earl of Soloway, created Duke of Dover.

The House of Lords endeavoured thus to impose a strange restriction upon the Crown's right of summons, maintaining that a Scotch peer, though not disqualified for receiving a peerage of the United Kingdom, was disqualified for receiving a writ of summons to sit and vote in the House.

[1] See debate and protest of dissentient peers. Cobbett, Parl. Hist. vi. 1047.

But in the year 1781 another Duke of Brandon prayed for his writ of summons, and the judges were asked by the House of Lords to say whether he was incapable of receiving a writ because he was also Duke of Hamilton, or, in the terms of the reference, 'whether the Peers of Scotland be disabled from receiving, subsequently to the Union, a Patent of Peerage of Great Britain with all the Privileges usually incident thereto.' In 1782 the judges delivered a unanimous opinion in favour of the claim, and there is now no doubt that the Crown, though it cannot summon a Scotch or Irish peer (apart from the representative peers), yet may acquire the right to summon such a peer by conferring upon him a peerage of the United Kingdom.

now rescinded.

3. *The Lords Spiritual.* The number of the Lords Spiritual sitting and voting in Parliament is now twenty-six—twenty-four bishops and two archbishops. An increase in the number of English bishops has not entitled the Crown to increase the number of Lords Spiritual summoned to Parliament, and the issue of the writ of summons is regulated by Acts of Parliament which provide for the creation and endowment of new Bishoprics.

Lords Spiritual.

In the Bishoprics Act of 1878 [1], which established certain new bishoprics, and in other Acts for the same purpose, it is provided that the number of Lords Spiritual shall in no case be increased by the foundation of the new bishoprics, but that whenever there is a vacancy among the Lords Spiritual by the avoidance of any see in England or Wales other than the sees of Canterbury, York, London, Durham, or Winchester, the vacancy is supplied by the summons of the senior bishop who has not previously become entitled to a writ. The five sees above named confer a title to a writ of summons at once.

The right of Crown limited by Statute.

Between the years 1800 and 1869 one archbishop and three bishops of the Irish Church were summoned, in rotation of sessions, to the House of Lords, but the Irish Church

[1] 41 & 42 Vict. c. 68, s. 5. This Act provided for the foundation of the bishoprics of Liverpool Newcastle, Southwell, and Wakefield. Its provisions have been applied by later Acts to the Bishoprics of Bristol (1894), Southwark and Birmingham (1904), Chelmsford, Sheffield, St. Edmundsbury, and Ipswich (1913), Bradford and Coventry (1917).

Act, 1869[1], provides that no archbishop or bishop shall henceforth be summoned to, or be qualified to sit in, the House of Lords by reason of his episcopal dignity; and by the Welsh Church Act, 1914[2], similar provision is now made with regard to bishops of the Church in Wales.

Descendibility.

4. *Descendibility.* A very important limitation upon the right of the Crown to issue the writ of summons is found in the hereditary character of the Lords of Parliament. The limitation may be stated and has been disputed in two ways: the Crown cannot withhold the writ from a man whose ancestor has been summoned by writ and has taken his seat; nor can it summon a man in pursuance of a patent limiting his peerage, and therewith the right to the summons, to the term of his life.

How it affects the right of summons.

The writ of summons issued without letters patent and followed by the taking of a seat, constitutes a descendible peerage, and this has been so held since the latter part of the seventeenth century, when the Clifton peerage was supported on the following grounds thus expressed by the judges who were consulted:—

That Sir Jervas Clifton was summoned to Parliament by the name of Jervas Clifton of Leighton Bromswold, by writ, dated July 9. 9 Jac. I.

That he accordingly did come and sit in Parliament as one of the peers of England.

That he died 16 Jac. I, leaving issue behind him Catherine, his sole daughter and heir, who married to the Lord Aubigny, afterwards Duke of Lennox.

That the said Duke, 17 Jac. I, was by letters patent created baron Leighton of Leighton Bromswold, in the county of Huntingdon, to him and the heirs male of his body, whereof none are now living.

That the petitioner is lineally descended from him and is his heir (by the said report) and as such now claims the barony of Clifton.

All which being admitted to be true we are of opinion,

First, that the said Sir Jervas, *by virtue of the said writ of summons, and his sitting in Parliament accordingly*, was a peer and baron of this kingdom, and his blood thereby ennobled.

[1] 32 & 33 Vict. c. 42, s. 13. [2] 4 & 5 Geo. 5, c. 91, s. 2.

Secondly, that his said honour descended from him to Catherine, his sole daughter and heir,[1] and successively after several descents to the petitioner as lineal heir to the said Lord Clifton.

Thirdly, that therefore the petitioner is well entitled to the said dignity[2].

Life peers.

Again, if the Crown creates a peerage by letters patent with an accompanying writ, a limitation in the patent to the life of the grantee will be held to invalidate the grant, so far as it is intended to convey the right to a writ of summons.

The question arose and was argued at length and finally determined by a Committee of Privileges in the case of the Wensleydale peerage.

It is not necessary, in this place, to discuss the possible advantages of this contemplated action of the Crown; or how far the House might have been the stronger for a reinforcement, from time to time, of eminent men whose fortunes might be inadequate to support an hereditary peerage, though their abilities might increase the usefulness of a second chamber. We are concerned only with the legal aspect of the matter, and it may be stated as follows.

What the Crown might have done.

If the Queen had addressed a writ of summons to Baron Parke as Lord Wensleydale, and there had been no patent limiting the grant, the House could not have questioned the right of Lord Wensleydale to take his seat, nor could the Crown have refused a summons to Lord Wensleydale's heir after his death[3]. The first of these propositions was laid down by Lord Campbell in debate, and admitted; the second follows from the decision of the Clifton peerage case cited above. The words of Lord Campbell on the first point are significant.

'The writ without the patent is conclusive evidence of an intention to create a barony in fee, which is clearly within the prerogative of the Crown; but the writ *with the patent as clearly shows the intention merely to give operation to the patent*, and that the nominee shall have nothing beyond the dignity and privileges which the patent may lawfully confer[4].'

[1] *Ante*, p. 215.
[2] Collins, 292.
[3] 140 Hansard, 3rd ser. 362.
[4] Ibid., 331.

The House, as we shall see later, enjoys the privilege of inquiring into the validity of new grants of peerage conferring the right to sit and vote, and was therefore entitled to examine the patent and see whether the prerogative of the Crown was being exercised in accordance with the rights of the Peers of Parliament.

What it did.

Lord Wensleydale's patent contained what were ultimately regarded as two repugnant clauses—a limitation of the peerage to the term of his life, and a special provision that he should be entitled to a writ of summons as a Lord of Parliament.

The right of the Crown to create a life peerage by patent was practically undisputed, but it was admitted that for four hundred years there had been no instance of a 'commoner being sent under a peerage for life to sit and vote in the House of Lords,' and it was contended that even before that time no such instance had been satisfactorily established[1].

Historical argument.

It will be sufficient, without following the historical arguments of the learned lords who took part in the debate, to quote the summary of Dr. Stubbs as to the historical probabilities of the existence of Lords of Parliament who were life peers. There are, no doubt, cases which would seem to be cases of intermittent summons, or cases in which a man has been summoned during his life while his descendants have received no summons. Prynne has made out a list of these[2], and founds upon it an argument that a writ of summons no more necessarily makes a man an hereditary peer of Parliament than the return of a man as knight of a shire makes him an hereditary member of the House of Commons. But Dr. Stubbs tells us that—

'On careful examination Prynne's list shrinks to very small proportions; some of the names are those of judges whose writs have been confusedly mixed with those of the barons; some occur only in lists of summons to councils which were not proper Parliaments. In most of the other cases the cessation of the summons is explained by the particular family history; for example, the son is a minor at the time of his

[1] 140 Hansard, 3rd ser., p. 335. [2] Prynne, Reg. i. 332, 333.

father's death, and dies or is forgotten before he comes of age. In others, nothing is known of the later family history, and it must be supposed to have become extinct.'[1]

Dr. Stubbs goes so far as to say that 'no baron was ever created for life only without a provision as to the remainder or right of succession after his death.'

Authentic cases of life peerages.

The well-authenticated cases of grants of life peerages appear to fall under three heads:—(1) grants for life of higher rank in the peerage to persons already entitled to a writ of summons in virtue of an existing barony; (2) grants of baronies for life, with an express provision that the bearers of the title should not sit in Parliament;[2] (3) grants of life peerages to women, mostly the mistresses of the last two Stuart and the first two Hanoverian kings.

None of these support the contention in favour of the legality of a creation of a Lord of Parliament for life, and if such creations had been proved to be the practice of the thirteenth and fourteenth centuries, the disuse of them for four hundred years would have been a formidable argument against the revival of such a prerogative by the Crown. If precedents were to be drawn from times when the rules of the constitution were in many respects indefinite, and from the exercise of prerogatives which for hundreds of years the Crown had been content to forgo, we might have seen some strange results in the nineteenth century. As was pointed out in the debate, much of the Reform Act of 1832 was needless legislation if the Crown could have resorted to the power, which it undoubtedly exercised at one time, of issuing writs to new constituencies and withholding writs from others. Just as it was proposed that Queen Victoria should remodel the House of Lords, so William IV might have redistributed seats and remodelled the House of Commons, on the same principle, though necessarily on a larger scale.

Result of argument.

The Committee of Privileges reported against the claim of the Crown. The rule of law seems clear. The Crown can confer such dignities and with such limitations as it may please, but a Lord of Parliament must be an hereditary peer, except in the special cases of the bishops and the

[1] Const. Hist. iii. (5th ed.) 454 n.

[2] Ibid., 455, note 1: and see Wensleydale case, 5 H. L. C. 958.

lords of appeal in ordinary; when once an hereditary peer is summoned the right to a summons descends to his heirs, except in the special case of Irish representative peers.[1]

Alienage. 5. *Alienage.* The framers of the Act of Settlement [2] went so far as to provide that no person born out of the kingdom, unless born of English parents, even though naturalized, might be a member of either House of Parliament. The British Nationality and Status of Aliens Act, 1914,[3] enables an alien to become naturalized, and so to acquire political rights; but the alien until naturalized is not qualified for any parliamentary or municipal franchise, or entitled to any right or privilege as a British subject except such rights and privileges in respect of property as are thereby expressly given to him. It must be taken therefore that the Crown's right of summons is limited by the rule that only a British subject may receive a writ of summons to the House of Lords.

We may here note that power was given by the Titles Deprivation Act, 1917,[4] to remove from the peerage roll any peer reported by a Committee of the Privy Council appointed for the purpose to have adhered to the King's enemies during the late war. A peer so removed forfeits all right to receive a writ of summons, but a right is reserved to his successor to petition the Crown for a restoration of the peerage.

Bankruptcy. 6. *Bankruptcy.* A further limitation on the powers of the Crown must be noted in the case of bankrupt peers. The Bankruptcy Act, 1883,[5] disqualifies them from sitting and voting, but an unrepealed clause of the Bankruptcy Disqualification Act, 1871, provides that 'a writ of summons shall not be issued to any peer for the time disqualified from sitting or voting in the House of Lords.'[6] The bankruptcy of any peer or other Lord of Parliament is to be certified by the Court as soon as may be to the Speaker of the House of Lords and the Clerk of the Crown in Chancery.[7]

[1] The representative Peers of Scotland are not individually summoned.
[2] 12 & 13 Will. III, c. 2, s. 3.
[3] 4 & 5 Geo. 5, c. 17; and see *ante*, p. 82. [4] 7 & 8 Geo. 5, c. 4.
[5] 46 & 47 Vict. c. 52, s. 32.
[6] 34 & 35 Vict. c. 50, s. 8. The general terms of this section must, it would seem, be limited by the title and purport of the Act.
[7] Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59) s. 106 (1).

§ 5. *Disqualifications for Sitting and Voting.*

There are some disqualifications which do not affect the royal right to issue the writ of summons, but which rest upon the individual peer. There would appear to be nothing to prevent the Crown from summoning such peers to attend, but a rule of law, or resolution, or standing order of the House would forbid them to sit and vote therein.

Infancy.

1. *Infancy* is such a disqualification, if not by the common law of Parliament, at any rate by a standing order of the 22nd of May, 1685, to the effect that 'no lord under the age of one and twenty years shall be permitted to sit in this House.'

2. *Sex.* Although a barony by writ descends to heirs general, and a woman may therefore be a peeress in her own right, the privilege of acting as an hereditary counsellor to the Crown is confined to the male sex and no woman has ever been summoned to sit in the House of Lords. A question arises, however, whether the Sex Disqualification (Removal) Act, 1919,[1] has enabled her to do so. This Act provides that a person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, and it may be argued that to sit and vote in the House of Lords is to exercise a public function, from which a peeress in her own right was at the time of the passing of the Act disqualified by reason of her sex. It would seem, however, that the matter is one which, for the reasons hereafter given, the House of Lords themselves can alone determine ;[2] and it may be noted that an amendment adopted by the House of Commons in the course of the debates on the Act of 1919 by which 'public function' was expressly declared to include sitting and voting in the House of Lords was rejected by the Lords and not insisted upon by the House of Commons.[3]

Felony.

3. *Felony* is now a disqualification similar in its character and effects to the like disqualification in the case of members

[1] 9 & 10 Geo. 5, c. 71, s. 1.

[2] *Post*, pp. 245–7.

[3] 174 Commons' Journ. 330, 376; 151 Lords' Journ. 431. A claim by a peeress in her own right to receive a writ of summons is now pending.

of the House of Commons. For by the Forfeiture Act, 1870,[1] the old rule as to corruption of blood is abolished, and, except in the case of outlawry, the forfeiture which ensued upon corruption of blood. A conviction of treason or felony, therefore, is no longer held to affect the nobility of blood of the convicted person; but it incapacitates him, if the conviction is followed by a sentence of a certain severity,[2] from sitting or voting as a member of either House of Parliament until he has either suffered his term of punishment or received a pardon under the great seal or sign manual.

Sentence of House.

4. *Sentence of the House.* It is presumed that the House of Lords could not, any more than the House of Commons, by mere resolution exclude a member of its own body permanently from taking a part in its proceedings. But it can disqualify by sentence, sitting as a Court of justice, either upon an impeachment by the House of Commons or, presumably, upon trial of one of its own members, in the full House if Parliament is sitting, if not, in the Court of the Lord High Steward. And this sentence passed by resolution of the House is an actual disqualification, and not, as in the case of the expulsion of a member by the House of Commons, a punishment which may or may not be temporary, as the person expelled does or does not obtain re-election.

Thus the sentence upon the Earl of Middlesex, Lord High Treasurer of England, impeached by the House of Commons for bribery, extortion, and other high crimes and misdemeanours, was settled by resolution of the House, before the Commons had demanded that sentence should be passed. Lord Middlesex was to be incapable of holding office, to pay a fine to the King, and then came :—

'The sixth question, "Whether the Lord Treasurer shall ever sit in Parliament hereafter, or no?"

Agreed "that he shall never sit hereafter."'[3]

[1] 33 & 34 Vict. c. 23.

[2] The punishments which must follow conviction in order to produce this effect are penal servitude, or imprisonment with hard labour for any term or without hard labour for a term of twelve months.

[3] Lords' Journals, iii. 382.

Sentence to this effect was passed on sentence being demanded by the Commons. But the Crown can exercise the prerogative of pardon and so remove the disqualification and restore the right to sit and vote.

5. *The Oath.* The obligation of the Parliamentary oath was not imposed upon the Lords till more than a hundred years after it had been required of the Commons. But since 30 Car. II, c. 1, the law respecting the oath has been the same for the Lords as for the Commons, and it now depends on the Parliamentary Oaths Act, 1866,[1] modified by the later Acts of 1868, 1888 and 1909.[2]

§ 6. *Modes of acquiring right to sit and vote.*

The right to sit and vote :

We have now dealt with the limitations which are set upon the right of the Crown in respect of the creation of peers ; with the further limitations which restrict the right of the Crown to summon those on whom it has conferred the dignity of the peerage ; and with the disqualifications which, apart from any restrictions on the Crown's right of creation or summons, may be a bar to a peer's right to sit and vote. It remains to consider the process by which the right to sit and vote is acquired, before discussing the privileges of the Lords and their mode of transacting legislative and judicial business.

i. *Peers of the United Kingdom.*

how acquired by peer of the United Kingdom,

A peer of the United Kingdom is now invariably created by letters patent, and these are accompanied by a writ of summons to the House. On his introduction to the House he presents his patent of peerage to the Chancellor, and this having been read is, together with his writ of summons, entered upon the Journals of the House. At each successive Parliament he receives a separate writ of summons in the form set forth in an earlier chapter.

A peer who succeeds to his peerage during infancy is entitled to his summons when of full age ; a peer who

[1] 29 & 30 Vict. c. 19.

[2] Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72) ; Oaths Act, 1888 (51 & 52 Vict. c. 46) ; Oaths Act, 1909 (9 Edw. 7, c. 39).

succeeds when of full age is entitled at once and makes application to the Chancellor for a writ. The mode of application rests upon custom. Usually, a near relation of the peer who desires to claim his writ of summons makes a communication to the Lord Chancellor. The peer then produces certificates of his father's marriage, of his own baptism and of his father's burial, an extract from the Journals of the House showing that the late peer took his seat, and the patent which directs the devolution of the peerage. A near relative makes a declaration that the person described in these documents is the peer who claims his seat. Unless the case is one of doubt the writ is issued at once, and he takes his seat without the formalities required in the case of a newly created peer. If the case should be doubtful, the Chancellor may decline to order the issue of the writ. The claimant must then petition the King, through the Home Office. The process by which a doubtful claim is dealt with will be described below.[1]

It would seem that if a peer on succeeding to his peerage did not apply for his writ of summons he would nevertheless be liable to be summoned, and a high authority has maintained that, whether he did or did not make application, it would be the duty of the Lord Chancellor to issue a writ to a Peer whose title was beyond question.[2]

ii. *Representative peers of Scotland.*

by Scotch representative peers.

The Act of Union with Scotland makes no provision for any addition to the Scotch peerage, so it is not necessary to go behind the process by which the Representative peers obtain their right to sit and vote.

Proclamation.

It is provided by 6 Anne, c. 23 (78, in revised Statutes), that whenever a new Parliament is summoned, a proclamation should be made under the Great Seal, commanding the peers of Scotland to meet in Edinburgh, or at such other place and at such time as is named in the proclamation. This proclamation has to be published at the Market

[1] *Post*, pp. 245–7.

[2] Evidence of the Clerk of the Crown in Chancery: Report on Vacating of Seats, p. 21. Commons' Papers, 1894 (278).

Cross at Edinburgh, and in all the county towns of Scotland ten days at least before the day of election.[1] By custom the election takes place at Holyrood, and is marked by some curious features.

Election.

The Peers sit at a long table, and the roll of peerages is called over by the Lord Clerk Register: each answers to the peerage in right of which he is present. The roll is a roll not of peers but of peerages, so that the same peer may be called two or three times if he happens to represent more peerages than one: nor is there any mode of disputing, at the time, the right of any one to be present who answers to a peerage called. The roll is then called a second time, and each peer rises and reads out his list of those for whom he desires to vote. No peer may vote more than once, though he may represent more than one peerage. At the conclusion of this part of the proceedings proxies are handed in, the Lord Clerk Register then reads out the list of sixteen elected peers, and makes a return, which he signs and seals in the presence of the assembled peers. The Return is then sent to the Clerk of the Crown in Chancery, and by him transmitted to the Clerk of the House of Lords. The elected Scotch peer does not therefore receive a special summons, but presents himself to take the oath, which is preliminary to taking his seat, in right of his election as evidenced by the list supplied to the Clerk of the House: he then enjoys his right to sit and vote during the continuance of that Parliament. The rules of election seem to offer opportunities for the giving of votes by persons not entitled to vote; for those who are assembled as representing the peerages on the roll are not required to offer any evidence of their right to be present. So when a peerage is called the Lord Clerk Register is compelled to receive any votes tendered in respect of it except in so far as he may be debarred by a clause in the Act about to be referred to.

[1] It seems strange that in 1874 the officials concerned in the conduct of the election of Scotch peers did not appear to be aware that the time had been shortened from the period of twenty-five days required by the Act of Anne; 14 & 15 Vict. c. 87. See Report on the Representative Peerage of Scotland and Ireland, p. 21. Lords' Papers, 1874 (140).

An Act of 1847[1] has, though inadequately, attempted to supply a remedy for this inconvenience. It provides—

Legislation of 1847.

1. That peerages in respect of which no vote has been given since 1800 shall be struck off the roll, and no vote accepted from persons claiming to represent them unless the House of Lords should specially give direction to that effect. s. 1.

2. That if a right to vote is disputed, any two peers present may enter a protest, and the Lord Clerk Register is thereon bound to send the proceedings to the Clerk of Parliaments, and the claim is considered by the House of Lords in Committee of Privileges if application is made for such inquiry. s. 3.

Scotch representative peers.

3. That if a claim has been established in the case of an individual to a particular peerage, no vote is to be received in respect of that peerage from any other than that individual during his lifetime. s. 4.

Nevertheless it may happen that a man without any right to vote may vote, and vote unquestioned, unless two peers present should think it worth their while to protest, and further to move the House of Lords to inquire into the validity of the vote.

It was held, by a Committee of Privileges in 1786, that a Scotch representative peer on accepting a peerage of the United Kingdom vacated his seat as a representative peer. There is, however, an instance to the contrary in the Parliament of 1886–92.[2] The matter seems doubtful.

iii. *Representative Peers of Ireland.*

Irish representative peers.

The Act of Union with Ireland provides for the reduction of the number of Irish peers to one hundred, but enacts that until that limit is reached the Crown may create one new peerage for every three which become extinct, and that when the number is reduced below one hundred from any cause 'it shall and may be lawful' for the King to keep

[1] Representative Peers (Scotland) Act, 1847 (10 & 11 Vict. c. 52).

[2] See May (ed. 12), p. 10, and Pike, Const. Hist. of House of Lords, p. 362.

the number up to one hundred exclusive of such Irish peers as may be entitled to hereditary English peerages.

Of the Irish peerage twenty-eight are elected as representatives of the whole body in the House of Lords, and each representative peer enjoys his right as a Lord of Parliament for the term of his life.

Mode of Election.

All the peers of Ireland are entitled to vote at the election of the representative peers, and their right to vote is certified by the Chancellor of England through the Clerk of the Parliaments to the Clerk of the Crown in Ireland, in each case of a new peer becoming entitled to be placed on the voting roll.

When an election has to be made, owing to the death of a representative peer, a certificate of the death is sent by two other such peers to the Lord Chancellor of England, who thereupon issues a writ to the Lord Lieutenant[1] of Ireland directing him to provide for the holding an election.

The person responsible for the conduct of the election is the Clerk of the Crown and Hanaper in Ireland, who on receipt of a warrant from the Lord Lieutenant sends voting papers to all the peers who have proved to the House their right to be on the Roll and who apply for papers. The voting papers are sent in duplicate, each form having a writ attached to it; the peer fills up the duplicate papers, seals them and sends them to the Clerk of the Crown.

Mode of voting.

But before filling up the paper he is required to take the oath of allegiance before a judge in England or Ireland, a privy councillor, an ambassador or secretary of an embassy abroad, or a justice of the peace for any Irish borough or county. It may well happen that an Irish peer not resident in Ireland has some difficulty in satisfying this requirement. And as a matter of fact, Irish peers do lose their votes because they cannot, without great inconvenience, present themselves before any of the persons qualified to administer the oath.

After a lapse of thirty[2] days from the day of the issue of the writ the poll is closed, and the Clerk of the Crown

[1] Formerly to the Lord Chancellor of Ireland: see *ante*, p. 56 (n.).

[2] Election of Representative Peers (Ireland) Act, 1882 (45 & 46 Vict. c. 26).

hands in one copy of the writs and voting papers at the Bar of the House of Lords, together with a certificate stating the number of votes given for each peer who has been voted for, and who it is that is elected.[1] The elected peer is entitled to a writ of summons on his election and at each successive Parliament.

No vacancy is created among the Irish representative peers by the promotion of any one of them to a peerage of the United Kingdom.

iv. *The Lords Spiritual.*

The form of writ addressed to the Bishop or Archbishop entitled to a summons to the House of Lords has been given earlier, and it has been noticed that the royal right of summons in respect of bishoprics is limited by the Acts which provided for the creation and maintenance of new bishoprics. It remains to consider the process by which a person in holy orders becomes a bishop, and the steps by which his title to summons is perfected, subject to the limitations already mentioned as to the number of lords spiritual who may be lords of Parliament.

Process of creation.

Congé d'élire.

On a vacancy in a bishopric or archbishopric, the first stage in the proceedings is the notification of the vacancy by the dean and chapter to the Crown in Chancery. The Crown thereupon sends them a *congé d'élire*, together with letters missive containing the name of the person whom they are desired to elect. The *congé d'élire* is a form: if the election is not made in accordance with the letters missive within twelve days of their receipt the Crown appoints by letter patent.[2]

Letters missive.

Consent.

The next stage in the process, following upon the election by the dean and chapter, is the consent of the person

[1] In the Session of 1908 resort was had to the quaint procedure provided by the Act of Union for the case of an equality of votes between two candidates. Lords Ashtown and Farnham obtained an equal number of votes. Their names were written on two pieces of paper, similar in form, these were put into a glass, and the Clerk of the Parliaments, Sir Henry Graham, drew out one. Lord Ashtown's name was drawn, and he was declared duly elected. 195 Hansard, 4th Ser., p. 1129.

[2] 25 Hen. VIII, c. 20. Where, as in the case of a new bishopric, there is no dean and chapter, the Crown appoints at once by letters patent.

elected: he must signify this before a notary public, and make oath and fealty to the Crown. He does this immediately before, and as part of, the business of his confirmation. He thereupon becomes Lord Bishop elect. It remains that he should be confirmed in his election, consecrated, and enthroned.

Oaths of fealty.

The confirmation is brought about by the issue of letters patent under the great seal,—in the case of a bishopric, to the archbishop of the province; in the case of an archbishopric, to four bishops, or to one archbishop and two bishops. The ceremony takes place before the vicar-general of the province. The forms of confirmation are solemn, elaborate, and idle. A proctor represents the dean and chapter by whom the bishop has been elected. He presents to the vicar-general the letters patent requiring the election to be confirmed, and requests that opposers of the confirmation may be publicly called upon to show cause against the proceedings about to be taken. They are called, but, if they should appear, they will not be heard.

Confirmation.

On the occasion of the confirmation of Dr. Hampden who had been appointed and elected to the bishopric of Hereford, opposers were present and were prepared to state reasons against the confirmation. The vicar-general refused to hear them, and when they applied to the Court of Queen's Bench for a *mandamus* to compel a hearing of their objections,[1] the Court was evenly divided on the question whether the *mandamus* should issue or not: consequently the matter went no further.

The opposers.

On the occasion of the confirmation of the election of Dr. Gore to the bishopric of Worcester certain objectors to the appointment took proceedings in the King's Bench Division to obtain a *mandamus* to compel the archbishop and his vicar-general to grant them a hearing. The Court held, after an elaborate argument, that the Act 25 Henry VIII, c. 20, was clear in requiring the confirmation to take place forthwith, that no case had arisen since the passing of the statute in which objections had been entertained by the archbishop, and that he had no jurisdiction to entertain

Their right to a hearing.

[1] *Reg.* v. *The Archbishop of Canterbury*, 11 Q. B. 483 (1848).

objections as to doctrines held or opinions expressed by the bishop prior to his appointment and election.[1]

Conditions under which a hearing might take place.

It was admitted that circumstances, wholly unexpected and abnormal, arising subsequent to the appointment and before the confirmation, might entitle the archbishop to give a hearing with a view to ascertaining whether the confirmation should be postponed until the facts alleged were brought to the knowledge of the advisers of the Crown. It was also suggested by the Court that the language of the citation might be somewhat modified, so as to indicate more clearly the formal character of the proceedings, and it would seem that the archbishops might provide such a procedure[2] as would enable reasonable objections to be heard, or else might divest the process of confirmation of a meaningless ceremonial and reduce it to a formal act.

When the confirmation is concluded the vicar-general commits to the bishop elect the care, governance and administration of the spiritualities of his see and decrees that he should be enthroned. The bishop then acquires the rights as to spiritual discipline and jurisdiction which belong to his office, but he is not entitled to its temporalities until after consecration. When this has taken place he does homage to the King for the temporalities of his see, and takes an oath of fealty to him. He thereupon becomes entitled in his turn, or at once if he hold a bishopric which confers a seat in Parliament immediately, to his writ of summons to the House of Lords.

Consecration. Homage.

Do bishops sit as temporal barons,

Whether a bishop sits in the House of Lords in virtue of a temporal barony, or of his ecclesiastical status, is a matter of purely historical interest. Doubtless the bishop was summoned to the Witan in his spiritual capacity, as to an assembly of the wise. It is also beyond question that the bishops and many of the abbots, after the Conquest, held their lands of the Crown as temporal baronies. But the conditions under which bishops were summoned to Parlia-

[1] *R.* v. *Archbishop of Canterbury* [1902], 2 K. B. 503.

[2] See report of proceedings in the Convocation of Canterbury, in The Times of Jan. 28, 1897, p. 8, and see the remarks of the Archbishop of Canterbury when objection was taken to the confirmation of the Archbishop of York in The Times, Jan. 21, 1909.

ment when Parliament came into existence are not so clear. They were summoned to sit, and they sat, with the estate of the baronage. They were bidden by the *Praemunientes* clause to summon the clerical estate. If we regard the early Parliaments as called together mainly to vote supplies to the Crown, we may suppose that the estate of the clergy was summoned to ensure a due contribution from that estate, and that the bishops and abbots, holding temporal baronies, were summoned in virtue of these, and with the same object. If we regard these Parliaments as Councils of the Crown, and assume that the bishops were summoned as counsellors, it is still difficult to dissociate them from the baronage, because the Norman and Plantagenet councils were assemblages of the great feudal vassals.

or in right of spiritualities ?

In support of the view that the bishop sits in virtue of his spiritual functions may be urged, firstly, the difference in the form of his writ. He was summoned 'fide et dilectione,' and now 'on his faith and love,' not like the temporal peer, on his 'faith and allegiance.' Again, during a vacancy in the bishopric, or during the absence of the bishop in foreign parts, the guardian of the spiritualities was summoned in his place.

Thus in the eleventh year of the reign of Henry VII writs of summons were issued ;

'Custodi spiritualitatis episcopatus Lincolnensis, sede vacante.'

'Custodi spiritualitatis episcopatus Bangorensis, ipso episcopo in remotis agente.'

At the present time the homage done to the King for the temporalities of the see, and the oath of allegiance taken, suggest that the bishop sits as a baron. On the other hand neither the bishops created in the reign of Henry VIII nor those who occupy the sees created in the last and present reigns have ever held baronies, and now that the lands of bishoprics are transferred to the Ecclesiastical Commissioners, any conclusions which may be founded on the connexion of barony and tenure must be regarded as obsolete. Whatever he may once have been, the bishop is now a Lord of Parliament in virtue of his office.[1]

[1] See Pike, Constitutional History of the House of Lords, ch. ix.

In respect to the right to be tried by peers in the Court of the Lord High Steward, or of taking part in such trials, or in impeachments, the bishops have lost the position, which they once undoubtedly claimed, as peers of the realm.[1] On the one hand they claimed exemption, not only from the Court of the Lord High Steward, but from all secular jurisdiction. On the other hand they could not, as ecclesiastics, pass sentence of death,[2] and so if they were summoned to serve in the Court of the Lord High Steward they were at one time held entitled to appear by a Proctor.[3]

The result of this was that they were excluded from trial in the Court of the Lord High Steward without obtaining immunity from other jurisdictions, and that, as the Court consisted, for a long time, of persons specially summoned, the bishops, who could not take part in passing sentence, were left out.

Finally, the Lords in 1692 resolved that 'Bishops who are only Lords of Parliament are not Peers, for they are not of trial by nobility,'[4] and as a corollary to this it was laid down by Blackstone that as the bishops have no right to be tried in the Court of the Lord High Steward, they 'therefore surely ought not to be judges there.'[5]

The bishop sits in the House of Lords in virtue of a writ of summons in the form given in an earlier chapter, and subject to the limitation of number stated earlier in this chapter.

A bishop may resign his see and therewith lose his seat in the House of Lords,[6] though he retains 'his rank, dignity, and privilege.'

[1] Pike, Const. History of the House of Lords, pp. 157 *et seq.*

[2] Constitutions of Clarendon, § xi.

[3] Year Book, 10 Ed. IV, no. 17, p. 6.

[4] Standing Orders, LXVI.

[5] Blackstone, Comm. iv. 265. This matter is fully discussed by Mr. Pike, Const. History of the House of Lords, pp. 212–223.

[6] Bishops Resignation Act, 1869 (32 & 33 Vict. c. 111) s. 5.

v. *The Lords of Appeal in Ordinary.*

Lords of Appeal;

It is unnecessary to enter here upon the judicial functions of the House of Lords: it is enough to say that for most purposes it is a final Court of Appeal from the King's Courts in England, Scotland and Northern Ireland: that there is nothing but the conventions of the House to prevent any peer of Parliament from taking part in such Appeals, but that the Appellate Jurisdiction Act, 1876,[1] has provided that no appeal shall be heard or determined unless there are present at such hearing and determination at least three Lords of Appeal. The Lords of Appeal are of three kinds, (1) the Lord Chancellor for the time being, (2) such Lords of Parliament as have held high judicial office, (3) the Lords of Appeal in ordinary. It is with these last that we are concerned. They form an exception to the general rules which govern the tenure of a right to sit and vote in the House of Lords, and like the bishops they transmit no rank or dignity to their descendants.

under the Act of 1876;

The Appellate Jurisdiction Act of 1876 gave power to the Crown to appoint four Lords of Appeal in ordinary. Their number has since been increased to six.[2] They must possess certain qualifications—that is, they must have held, for two years, high judicial office, or have practised at the English, Scotch or Irish Bar for fifteen years; they are entitled to salaries of £6000 a year; and, as judges, they hold office on a like tenure to other judges, during good behaviour, unaffected by the demise of the Crown, but removable on an address of both Houses of Parliament.

It is practically necessary that one Lord of Appeal should be chosen from the Scotch Bench or Bar owing to the differences which exist between Scotch and English private law; it is usual though not necessary that the Irish Bench or Bar should be similarly represented among the Lords of Appeal.

are life peers.

Besides this, each Lord of Appeal is entitled to the

[1] 39 & 40 Vict. c. 59, amended by the Appellate Jurisdiction Act, 1887 (50 & 51 Vict. c. 70). See *En re Lord Kinross* [1905] A. C. 468, at p. 476.

[2] Appellate Jurisdiction Act, 1913 (3 & 4 Geo. 5, c. 21) s. 1.

dignity of Baron for his life, and to a writ of summons to attend, and to sit and vote in the House of Lords. Until 1887 his right to a summons was dependent on the continuance of his discharge of judicial functions. It is now a right which lasts for the term of his life.

The Peers of the United Kingdom are the only members of the House of Lords whose right to sit and vote is descendible. Of the rest, the representative peers of Ireland and the Lords of Appeal enjoy a right necessarily coextensive with the term of their lives. A Scotch representative peer may lose his seat by non-election, or vacate it by the acceptance of a peerage of the United Kingdom; a bishop may resign his see, and with it his right to be summoned to Parliament.

Introduction of peers.

The formalities of the introduction of peers rest on the standing orders of the House of Lords.[1]

A peer by descent needs no introduction, but may take his seat at any time after attaining the age of twenty-one. Peers who are summoned in virtue of newly created peerages, or in virtue of special limitations in remainder in patents of old peerages, are introduced by two peers, their patents presented to the Chancellor and read by him, and their writs of summons also presented. The patent and writ are both entered on the Journals of the House. This rule does not of course apply to the Scotch representative peers. The taking and subscription of the oath or affirmation of allegiance completes the title to the seat.

Rank and precedence of peers.

We may note here the ranks and precedence of the members of the Peerage. The title of Duke was first conferred on a subject by Edward III, who created his son, the Black Prince, Duke of Cornwall. That of Marquis dates from the reign of Richard II. Earldoms date from Saxon times, The first Viscount was created by Henry VI; and when we come to the origin of the lowest rank of the peerage, that of Baron, we must recur to the antiquarian discussion of a few pages back.

The placing of the Lords.

The station of the peers and their precedence within the House are regulated by 31 Henry VIII, c. 10, 'for placing

[1] Standing Orders, XII–XV.

of the Lords.' This Act recites that 'in all great councils and congregations of men having sundry degrees and offices in the Commonwealth, it is very requisite and convenient that order should be had and taken for the placing, and sitting of such persons as are bound to resort to the same,' and then proceeds to order the placing of the Lords. The royal children alone have place beside the King. First on the right-hand side was to sit the King's vice-gerent, then the two archbishops, the bishops of London, Durham, and Winchester, and the others 'after their ancienties.' On the left-hand side were to sit first the Lord Chancellor, the Lord President of the Council, the Lord Privy Seal, above all dukes save such as were of the blood royal. Other great officers were to sit above all peers of a like rank to themselves. Such were the great chamberlain, the constable, marshal, lord admiral, lord steward, and King's chamberlain. The King's secretary if a baron was to sit above all other barons, if a bishop above all other bishops. Then it was provided that 'all Dukes, Marquesses, Earls, Viscounts and Barons not having any of the offices aforesaid shall sit and be placed after their ancienties as it hath been accustomed.' Such great officers as were not peers were to sit in the middle of the chamber [1].

§ 7. *Privileges of the House of Lords.*

Privileges of the Lords.

The privileges of the House of Lords may be dealt with more shortly than those of the Commons. They have less frequently brought the House into conflict with the Crown, and very rarely with the Courts. Perhaps the most important are those concerned with the judicial duties of the House. They may conveniently be considered in the same order as the privileges of the House of Commons, and note taken of such correspondence or difference as may exist.

Speaker of the Lords.

Firstly, the Lords do not go through the form of asking for their privileges. The Speaker of the House is, by prescription, the Lord Chancellor or Lord Keeper of the Great Seal; in his absence his place is taken by deputy Speakers, of whom there are always several, appointed by

[1] 31 Hen. 8, c. 10, s. 8. The places assigned by the Act are not at the present day occupied as prescribed.

commission, and if they should all be absent the Lords elect a Speaker for the time being. The woolsack on which the Speaker sits is outside the limits of the House, so that the office may be discharged by a commoner, and has been so discharged when a commoner has been Lord Keeper of the Great Seal, or when the Great Seal has been in commission[1]. Nor has the Speaker of the House of Lords the authority on points of order, nor the dignity in relation to the other members of the House, which is possessed by the Speaker of the House of Commons[2].

Officers of the House.

The permanent officers of the House are the Clerk of the Parliaments, whose duties are to keep the records of the proceedings and judgments of the House; the Gentleman Usher of the Black Rod, whose duties answer to those of the Serjeant-at-Arms in the Commons; and the Serjeant-at-Arms, who is more especially the attendant of the Chancellor.

The privileges of the House are not formulated in any demand for their enjoyment; but as we have seen, the privileges of the Commons are not limited to those which the King is asked to recognize. We may now note what are the privileges of the House of Lords, comparing them, where possible, with those of the House of Commons.

Freedom of the person;

Freedom from arrest is claimed by the Lords as well as by the Commons. It is claimed by the Lords when Parliament is sitting or *within the usual times of privilege of Parliament*, except in cases of treason, felony, or refusing to give security for the peace; and this privilege is held to extend to their servants and followers during session and twenty days before and after[3].

[1] It is still customary for a newly-appointed Lord Chancellor to take his seat upon the Woolsack before his introduction as a peer: see e. g. 151 Lords Journ. 21, 22 (4th Feb. 1919).

[2] 'The Lord Chancellor . . is not to adjourn the House, or do anything else as mouth of the House, without the consent of the Lords first had, except the ordinary thing about Bills, which are of course, wherein the Lords may likewise overrule . . .' Standing Orders, XX. See Lord Fitzmaurice's Life of Lord Granville, ii. 109–10, for an occasion on which order was only restored to a debate by the reading, on the motion of a peer, of S. O. XXVIII, which prohibits 'personal, sharp or taxing speeches'.

[3] Standing Orders, LVII-LX.

The privilege of declining to serve as a witness is now waived by the Lords as by the Commons, and that of freedom from jury service is confirmed by Statute.

of speech; Freedom of speech in the House of Lords has not come into question as often or as definitely as the like privilege in the Commons; but the attempts of Charles I to prevent the attendance of peers whom he considered to be hostile to himself[1], and the dismissal from non-political offices during the eighteenth century of peers who acted in opposition to the King's ministers, show that freedom of speech in the Lords has not been wholly unquestioned.

of access; The privilege of freedom of access to the person of the Sovereign exists for each individual peer, and not, as with the House of Commons, for the House collectively. This right would seem rather to belong to the magnates as hereditary counsellors of the Crown than to the Lords as a House of Parliament[2].

of excluding disqualified persons; The right of the House of Lords to see to the due constitution of its own body is perhaps better considered under the head of the judicial powers of the House, for some of these powers are matters of privilege, and some are not[3].

of commitment. It would appear that no question has ever been raised concerning the right of the House to regulate and control its own proceedings; and in comparing the privileges of the two Houses it only remains to consider the right of the House to commit for contempt. The House of Lords possesses wider powers in this respect than does the House of Commons[4]; it can commit for a definite term, and the prisoner is not released by prorogation. If however the commitment is not for a specific term, prorogation does, as it would seem, end the commitment[5], although Lord Denman in *Stockdale* v. *Hansard*[6] seems to have considered this to be doubtful.

Proxies. A privilege which the House has thought it right to

[1] Gardiner, History of England (1884), vi. 91, 94.

[2] See Lord Colchester's Diary, iii. 604; and cf. Queen Victoria's Letters, Lord John Russell to the Queen, 21st Aug. 1837.

[3] See *post*, pp. 245 *et seq.*

[4] *R.* v. *Flower*, 8 Durn. & East, 314.

[5] May's Parliamentary Practice (ed. 12), p. 92.

[6] 9 A. & E. 127.

forego since 1868 is that of voting on divisions by proxy. The origin of the practice was doubtless due to the desire of the King in the early days of Parliaments to secure that the members of the baronage were individually bound by the grants made or the laws agreed to in their House. 'Those lords,' says Elsynge[1], 'that could not appear according to their summons made their *proxies*.' But if they neither came nor made proxies, then for their disobedience to the King's writ they were amerced.' There were occasions when the King was not satisfied with an appearance by proxy, and on such occasions the writ contained a clause to the effect that a proxy would not be admitted[2].

The practice shows that a peerage involved liabilities as well as rights, and that the attendance of the peer in Parliament might at any time be insisted upon by the King.

The rules which the House adopted for the regulation of voting by proxy are now immaterial, for a standing order was made on March 31, 1868, that 'the practice of calling for proxies on a division shall be discontinued.'

Protests. The right of a dissentient peer to record a protest on the Journals of the House is not a privilege except in so far as the control of its own procedure by the House is a privilege. The House of Commons might by standing order confer the same right upon its members. But a minority in the House of Commons is content with the power of speaking in a debate and voting in a division. In the House of Lords a minority, or any part of one, enjoys a further opportunity for the expression of its views, and can enter the grounds of its dissent in the form of a protest upon the Journals of the House.

Judicial duties. The privileges of the House bring us into contact with its judicial functions, and we must distinguish the functions of this nature which concern privilege from those which do

Appellate. not. The appellate jurisdiction of the House rests now upon the Appellate Jurisdiction Act, 1876. This Act confirmed, defined and regulated the exercise by the House of

[1] Manner of holding Parliaments in England, p. 119.

[2] Report on Dignity of a Peer, Appendix I, Part ii. p. 408, and see Pike, Const. Hist. of House of Lords, pp. 243–245.

the jurisdiction which it previously enjoyed as a court of error or appeal from English, Scotch and Irish Courts.

Impeachment.

But neither the duties of the House as a court of final appeal nor its duty to try great offenders against the state, when impeached at its bar by the Commons, can be regarded as a privilege of the House.

The jurisdiction which is concerned with privilege is of two kinds, that which enforces the right of a peer to be tried by his peers, and that which enforces the right of the House to see to the due constitution of its body.

Trial of peers:

The first of these rights entitles a peer indicted for treason, or felony, or misprision of either, to be tried by his peers. This privilege is extended to Scotch and Irish peers by the Acts of Union and to peeresses by 20 Hen. VI, c. 6.

before King in Parliament.

The indictment is found in the ordinary course and the case removed by *certiorari* to the Court in which the peer claiming privilege is to be tried. This, if Parliament is sitting, is ' before the King in Parliament,' if out of session, it is the Court of the Lord High Steward. All peers are entitled to attend, and the difference between the two Courts is to be found in the position of the Lord High Steward, who is appointed for each case, as it may arise, by the Crown. If the trial takes place in Parliament, the Lord High Steward is merely the president of the Court, the peers are, equally with their president, judges of law and fact. In the Court of the Lord High Steward he determines all points of law, the peers are only judges of fact[1].

In Court of Lord High Steward.

Right to exclude disqualified persons

The privilege which the House of Lords enjoys in respect of the constitution of its own body is analogous to the right which the House of Commons exercises, when it prevents a disqualified person from taking part in its proceedings and declares the seat vacant for which such a person has been chosen.

In the debate on the *Wensleydale* peerage case Lord Campbell describes the nature of this right.

[1] See for a full account of this privilege, Palmer, Peerage Law in England, pp. 146–9. The last trial of the kind was that of *R.* v. *Earl Russell* [1901] A. C. 446.

'We have no right to consider the merits or demerits of the party who claims to take his seat here, if he be a British subject free from legal disability; but we have a right to see that he shows a title to sit here *ex facie* good: and if he claims by patent the validity of that patent is necessarily submitted to our jurisdiction. We may call in the judges as advisers, but the House decides *proprio vigore*. Like all other deliberative assemblies, we are necessarily vested with the power of preventing intruders from interfering with our deliberations.' He insists on the distinction between 'two things which are entirely dissimilar—deciding upon claims to an old peerage, and considering the validity of a new creation.'

in case of new creation.

It was in the exercise of this right to determine the validity of a new creation that the House decided in 1711 that the acquisition of an English peerage did not entitle a Scotch peer to a seat[1]. This decision was reversed in 1782 by the House, after taking the opinion of the judges. But the same right was exercised again, in 1856, in the case of Lord Wensleydale, the validity of whose patent was questioned and, in the end, negatived.

Right to insist on summons of qualified persons.

The converse of the right to exclude one who endeavours to take his seat with an invalid title is the right to insist that persons fully entitled are summoned and allowed to sit. In 1626 the peers petitioned Charles I to send to the Earl of Bristol the writ of summons which was wrongfully withheld from him[2]; and in the same year they compelled the King to release the Earl of Arundel who was detained in custody on no such charge as took his case out of the limits of privilege. The House met the numerous evasions of Charles by adjourning all other business to the consideration of their privileges, and the King thereupon set the Earl free[3].

Reference from Crown where old peerage in dispute.

In the case of claims to old peerages, the House has no right save such as the Crown confers by reference. The claimant petitions the Crown for a writ of summons; his petition is referred to the Attorney-General, who examines and reports upon it. If his report is favourable the claim

[1] *Ante*, p. 232. [2] Gardiner, Hist. of England (1884), vi. 94.
[3] Ibid. 114, 115; and Elsynge on Parliaments, 224 *et seq.*

may be at once admitted, and the writ issued; if there is any doubt the King refers the petition and report to the House of Lords. The House appoints a Committee of Privileges to inquire further, and the claimant must establish his case to the satisfaction of the Committee, whose resolutions are communicated by the House to the King.

Committee not bound by previous decisions.

It should be noted that whereas the decisions of the House of Lords, sitting as a Court of Final Appeal, are considered to be binding upon itself, and can only be reversed by legislation, the resolutions of one Committee do not bind a subsequent Committee. And this applies alike to decisions on the rights of newly created peers, and on the claims to old peerages.

Thus the House reversed in 1782 the decision arrived at in 1711, that an English peerage granted to a Scotch peer did not entitle him to sit and vote; and in the *Wiltes* case reversed its decision in the *Devon* case, that the Crown can create a peerage descendible in a manner unknown in the descent of an estate of freehold[1].

The House has, however, a statutory right, under the Act of Union, to decide all questions of the validity of Irish peerages; and a similar right by 10 & 11 Vict. c. 52 in the case of all claims to Scotch peerages, in respect of which no vote has been exercised since 1800, and in all cases in which a claim to vote has been made matter of protest by two peers whose rights are unquestioned.

The part played by the House of Lords in the practical working of the Constitution is hardly a matter for this book. Yet one may note the curious historical transformation whereby the estate of the baronage has, by the continuous exercise of the royal prerogative in the creation of peers, developed into a second chamber containing a fair representation of the general interests of the community, and in many respects admirably fitted to maintain a high level of political discussion.

The place and purpose of a second chamber, constituted

[1] Per Lord Chelmsford in the *Wiltes peerage case*, L. R. 4 H. L., p. 148; and cf. *St. John peerage case* [1915] A. C. 282.

on the lines of our House of Lords, have been dealt with by modern writers on the English constitution; by no one with more force and vividness of description than by Mr. Bagehot. But since he wrote, in 1868, the situation is changed in many respects. Extension of the franchise has given political power to the working classes; the institution of single-member constituencies has tended to produce, throughout the two political parties, uniformity of type, and that the type which represents the more extreme opinions professed by either party. The House of Commons is therefore further apart from the House of Lords than it was in 1868. But the House of Lords has also changed. Its numbers have increased from 426 in 1868 to over 700 in 1921, and this increase of numbers is not accompanied by any corresponding increase among the working members of the House. The son of a man who has been raised to the peerage for eminence in political or professional life, in the public service, or in business, has not necessarily the aptitude for public life, or interest in public affairs which would make him an active member of a legislative chamber, while his position inclines him to be content with things as they are. The House of Lords then is open to criticism on the ground that many of its members take little or no part in its business; that there is a large permanent majority on the Conservative benches, and that the House itself tends to be more and more estranged from a House of Commons elected on a democratic franchise.

Reform.

The reform of the House of Lords is not a topic with which to deal at length, but schemes of reform set forth of late years, and with authority, cannot be passed over.

In 1908 a Committee of the House of Lords recommended (1) that, save in the case of peers of the blood royal, a hereditary peerage should no longer give a right to a writ of summons; but (2) that the right might be conferred on hereditary peers qualified by the tenure of certain high offices in the State or by service for a specified number of years in the House of Commons; on hereditary peers elected for a Parliament by the peers generally, including

Scottish and Irish peers ; on the two archbishops and eight other spiritual peers elected by their own order ; and on forty life peers to be nominated by the Crown.

It was calculated that, with the Lord Chancellor and the Lords of Appeal, the House of Lords thus constituted would consist of 380 to 400 persons.

The report of this Committee is now a matter of historical interest ; for the reform of the House of Lords became a practical question when the limitation of its powers by the Parliament Bill came before the House in the autumn of 1910. The Preamble of the Bill of that year, like the Preamble of the Act of 1911, announced that it was intended ' to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot immediately be brought into operation.'

Preamble of Parliament Act.

The House of Lords in November 1910 passed resolutions to the effect that hereditary right should not of itself constitute a claim to a writ of summons, and that it was desirable to introduce elements from outside the hereditary peerage into the composition of the House.

In May 1911 Lord Lansdowne introduced a measure for the re-constitution of the House of Lords. This provided for a House consisting of (1) 100 new peers elected by their own order and possessing specified official or administrative qualifications ; (2) 120 members elected for large constituencies by members of the House of Commons having seats within those constituencies ; (3) 100 members appointed by the Crown on the advice of Ministers in proportion to the strength of parties in the House of Commons ; (4) 2 archbishops and 5 bishops chosen by the bishops from among their own number ; and (5) 16 members who had held high judicial office. Membership was to be for 12 years, one-fourth of the House retiring every three years. The prerogative of the Crown was to be limited to the creation of not more than five new peerages in any one year.

Lord Lansdowne's proposals.

It was contended that a Second Chamber thus constituted would be of convenient size, would be dignified, efficient and fairly representative of the political parties in the

State. The Bill did not go beyond the stage of a second reading.

The Second Chamber Conference.

In 1917 the success of the Speaker's Conference on the parliamentary franchise led to the appointment by the Prime Minister of a Second Chamber Conference representative of all parties and with wide terms of reference. The Conference was presided over by Lord Bryce and reported in April 1918.[1] The report showed that a large measure of agreement on fundamental points had been reached, and indicated the following functions as appropriate to a Second Chamber:

'(1) The examination and revision of Bills brought from the House of Commons, a function which has become more needed since, on many occasions, during the last thirty years, the House of Commons has been obliged to act under special rules limiting debate.

'(2) The initiation of Bills dealing with subjects of a comparatively non-controversial character which may have an easier passage through the House of Commons if they have been fully discussed and put into a well-considered shape before being submitted to it.

'(3) The interposition of so much delay (and no more) in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it. This would be specially needed as regards Bills which affect the fundamentals of the Constitution or introduce new principles of legislation, or which raise issues whereon the opinion of the country may appear to be almost equally divided.

'(4) Full and free discussion of large and important questions, such as those of foreign policy, at moments when the House of Commons may happen to be so much occupied that it cannot find sufficient time for them. Such discussions may often be all the more useful if conducted in an Assembly whose debates and divisions do not involve the fate of the Executive Government.'

Suggestions were put forward as to the elements which should find a place in a Second Chamber of this kind. These included persons with experience in various forms of public work, with special knowledge of important departments of

[1] 1918, Cd. 9038.

the national life, of foreign affairs and of matters affecting the over-seas dominions, together with ' a certain proportion of persons who are not extreme partisans, but of a cast of mind which enables them to judge political questions with calmness and with comparative freedom from prejudice or bias '.

Suggested composition of reformed Second Chamber.

The Second Chamber which found favour with the majority of the Conference was to consist of (1) 246 (or, if representatives of Ireland were included, 273) members elected on the principle of proportional representation by panels of members of the House of Commons distributed in certain geographical groups, the number of seats allotted to the area of each group being as nearly as may be in ratio to the population of the area ; (2) a number, equal to about one-fourth of the whole Chamber (exclusive of *ex officio* members) chosen by a standing joint committee of the two Houses from existing hereditary peers in the first instance, and eventually from hereditary peers to the number of 30 at least, and without restriction so far as regards the remainder ; (3) the Lord Chancellor, ex-Lord Chancellors, and the Law Lords ; (4) sons and grandsons of the Sovereign who are peers.

The term of office suggested (except for the Law Lords) was 12 years, one-third retiring every fourth year.

The report itself sets out clearly and concisely the reasons which led the Conference to the above conclusions, and these deserve the careful attention of the student. It is sufficient here to say that the object aimed at by the Conference, as stated by Lord Bryce, was to preserve a real continuity between the historic House of Lords and any reconstituted Second Chamber, and to secure ' three important requisites ' for the strength of the latter, ' in its having popular authority behind it, in its opening to the whole of His Majesty's subjects free and equal access to the Chamber, and in its being made responsive to the thoughts and sentiments of the people.'

The circumstances in which the report was published, at a critical moment in the fortunes of the war, perhaps prevented it from attracting the attention which its judicial

temper and bold handling of a difficult problem deserved; but whether or not the actual recommendations of the Conference will be found to provide a basis of reform acceptable to the House of Commons and to the electorate at large, the functions of a Second Chamber in a constitution like our own, and the elements from which it should be fashioned, have now been defined with insight and precision in such a way as to secure the assent of a body representing nearly all schools of political thought. It is therefore permissible to hope that when the time comes for the fulfilment of the preamble to the Parliament Act, some at least of the difficulties of the task will be found to have been already surmounted. Further than this it would be unprofitable to speculate.

CHAPTER VI

THE PROCESS OF LEGISLATION

We have now brought our Parliament together, have analysed its constituent parts, and have ascertained how they come into existence, and of what they consist. The next step must be to consider how they act.

Legislative functions of Parliament most striking because here Parliament is sovereign.

The most prominent if not the most important function of Parliament is legislation. Parliament, it is true, discharges other and serious duties in the discussion and criticism of the action of Ministers. In this respect the House of Commons represents, or should represent, in concentrated form, the public opinion of the country. It may be said, roughly, to represent public opinion as expressed at the previous general election. This function of Parliament is discharged in various ways which may be more properly dealt with in a later chapter; but the control which it can thus exercise over affairs is, at best, indirect; in making laws its control over conduct is direct and absolute. The sovereignty of Parliament is displayed in legislation.

Limitations on its sovereignty.

Legislative sovereignty is subject to the reservations which Mr. Dicey [1] has shown to exist in respect of all sovereignty, however absolute. The omnipotence of Parliament is dependent on a certain correspondence between legislation and public opinion, a correspondence which must be more or less close in proportion to the tractability, the political capacity, the organization of the governed. The law-maker in a despotism must consider first whether his law will cause a revolt; and next whether he has force at his back to crush it. The law-maker, in a state where the bulk of the population elects those who make the laws,

[1] Law of the Constitution (1915), p. 74 sq.

has to consider whether the majority will approve, or at any rate will accept his law. Usually, in civilized states, a law is obeyed, even by those who disapprove of it, until opportunity for change offers itself: and therefore, given a certain correspondence with public opinion, Parliament is omnipotent. From it there is no appeal save to the electorate, and that appeal can only be made by the Crown and at the instance of the ministers of the Crown. It is the business of the executive and of the Courts to give effect to the enactments of the legislature.

The exercise of this supreme legislative power, the outward and visible sign of sovereignty, is the form of Parliamentary action which we must now consider. We can examine later the duties of Parliament as a grand Court for national grievances, and as the critic of the executive.

Division of subject.

In dealing with the process of legislation in Parliament, we may divide the subject into seven heads, as follows :—

1. History of legislative procedure.
2. Ordinary procedure of the House of Commons. Public Bills.
3. Money Bills.
4. Procedure of the House of Lords. Relations of the Houses.
5. Private Bill Legislation.
6. Provisional and other Statutory Rules and Orders.
7. Ecclesiastical Measures.

Section I

HISTORY OF LEGISLATIVE PROCEDURE

§ 1. *The Rights of the Commons.*

Legislation before Parliament existed.

In considering how at different times laws have been framed and passed, we need not regard the forms in which the charters and assizes of the Norman and Angevin kings were issued. Magna Charta is, in form, a charter of liberties, in substance, a treaty between King and people, though it

is issued *per consilium venerabilium patrum, et nobilium virorum.* Other enactments of kings, though made before the representation of the counties and boroughs in the Commons, are made by the advice and with the assent of the national council. Whatever may have been the respective shares of the King and his counsellors, legislation proceeded from the King with the counsel and consent of a body of advisers variously constituted from time to time.

But we are concerned only with legislation by the Crown in Parliament; and the steps by which the Commons became partakers in this counsel and consent, and established thereby the legislative sovereignty of Parliament. The Confirmatio Cartarum is a solemn affirmation of the right of the Commons to be parties to taxation: an Act of the fifteenth year of the reign of Edward II is a like affirmation of their right to be parties to legislation. 1297.

The Confirmatio Cartarum runs thus:—

Rights of the Commons in respect of taxation:

'v. And for so much as divers people of our realm are in fear that the aids and tasks which they have given to us before time towards our wars and other business, of their own grant and goodwill, howsoever they were made, might turn to a bondage to them and their heirs, because they might be at another time found in the rolls, and so likewise the prises taken throughout the realm by our ministers: we have granted for us and our heirs, that we shall not draw such aids, tasks nor prises into a custom, for anything that hath been done heretofore, or that may be found by roll in any other manner.

'vi. Moreover we have granted for us and our heirs, as well to archbishops, bishops, abbots, priors and other folk of holy Church, as also to earls, barons and to all the commonalty of the land, *that for no business henceforth will we take such manner of aids, tasks nor prises, but by the common assent of the realm, and for the common profit thereof, saving the ancient aids and prises due and accustomed.*'

of legislation,

And the Act of 1322 is even more explicit on the legislative rights of the Commons:—

'The matters which are to be established for the estate of our lord the King and of his heirs, and for the estate of the realm and of the people, shall be treated, accorded and established in parlia-

ments by our lord the King, *and by the assent of the prelates, earls and barons and the commonalty of the realm*, according as hath been heretofore accustomed.' 15 Edw. II.

Difficulties in the exercise of these rights.

But though the participation of the commonalty of the realm was thus early declared to be essential to the validity of taxation and of legislation, yet as a matter of practice it was a long time before the process of legislation assumed its present form. Two causes tended to produce this delay.

The Crown in Council possessed and exercised a concurrent legislative power, inconsistent with the provision of the Statute of Edward II that Crown, Lords and Commons should participate in all legislative acts. And again, the procedure through which the Commons at first exercised their right to partake in legislative functions did not secure that they obtained their due share in the framing of the required laws.

§ 2. *The claims of the Crown to legislate.*

The concurrent legislative power of the Crown in Council was a survival of the pre-Parliamentary Constitution, and is manifested in the distinction, so difficult to be drawn by the student of constitutional history, between Statute and Ordinance.

Statute and Ordinance: how distinguishable.

The recognized differences between these two modes of legislation are described by Dr. Stubbs as being differences partly of form, partly of character.[1] The *Ordinance* is put forth in letters patent or charter and is not engrossed on the Statute Roll; it is an act of the King or of the King in council; it is temporary, and is revocable by the King or the King in council. The *Statute* is the act of the Crown, Lords and Commons; it is engrossed on the Statute Roll; it is meant to be a permanent addition to the law of the land; it can only be revoked by the same body that made it and in the same form.

The Ordinance in fact seems to follow the form of legislation which was in use when the Crown in Council discharged

[1] Const. Hist. ii. (5th ed.) 615.

both legislative and executive functions. Its existence indicates the difficulty, which is noticeable for some time after Parliaments were at work, in distinguishing the functions of the Crown in Parliament from those of the Crown in Council, and of the 'Magnates' as Councillors of the Crown from the same persons as Lords of Parliament.

Illustration.

The difference between Statute and Ordinance is well illustrated by the proceedings of the year 1340. The petitions of that year were considered in two groups. One of these was ordered to be dealt with by a joint Committee [1] of the two Houses and related to such articles as were intended to be perpetual. These were 'by the common assent and accord of all' to be put into a Statute, 'lequel Estatut nostre Seignur le Roi, par assent des touz en dit Parlement esteantz, comanda d'engrosser et ensealer, et fermement garder par tut le Roialme d'Engleterre: et lequel estatut commence "A l'honur de Dieu &cet.[2]"'

The other group related to 'such points and articles as were not perpetual but for a time', and with these 'nostre Seignur le Roi, par assent des Grantz et Communes, fait faire et ensealer ses Lettres Patentes qui commencent en ceste manere, "Edward &cet. Sachetz que come Prelatz Countes &cet.[3]"'

Ordaining power of Crown questioned by Commons.

As the relative positions and duties of Crown and Parliament grew more definite, Crown and Commons alike realized the importance of this independent exercise of legislative power by the Crown in Council. The confusion is gradually cleared away in the time of Edward III. During that reign various experiments were tried for raising money at councils to which a limited number of knights and burgesses were

[1] The Committee consisted of prelates, temporal peers and judges, twelve knights of the shire, and six burgesses. Rot. Parl. ii. 113.

[2] Rot. Parl. ii. 113. The Statute, 14 Edw. iii. st. 1, runs thus:—

'To the Honour of God and of Holy Church, by the assent of the Prelates, Earls, Barons, and others assembled at the Parliament holden at Westminster, the Wednesday next after Mid-lent in the 14th year of the reign of our Lord King Edward the Third of England and the first year of his reign of France: the King for the peace and quietness of his people, as well great as small, doth grant and establish the things under-written, which he will to be holden and kept in all points *perpetually to endure*.'

[3] Rot. Parl. ii. 113.

Illustration.

summoned. Thus in 1353 an assembly of this sort sanctioned the Ordinance of the Staple [1], whereby trade was regulated, a new capital offence created, and a source of supply secured to the Crown. But the Commons present at this council protested against the enactment of matter so grave, unless in Parliament and in statutory form, and petitioned that the ordinances so made 'should not be of record as though they had been made by a general Parliament'. The King thereupon promised that steps should be taken to publish the Ordinances of the Staple and that in the next Parliament they should be rehearsed and put on the Roll of Parliament. Next year a Parliament, duly constituted, confirmed the Ordinances 'to be held for a Statute to endure always' and provided against further dealing with the matter save by consent of Parliament [2].

A source of conflict in 17th century.

As the distinction between Statute and Ordinance became manifest, the Crown came to assert definitely as a part of the prerogative the right to legislate independently of Parliament. The Royal Proclamations of the sixteenth and seventeenth centuries form the battleground of the old controversy which is fought under changed names, and the right of the Crown to tax or to legislate without Parliamentary sanction is asserted and disputed in one form or another from the Ordinance of the Staple to the Bill of Rights.

§ 3. *The share of the Crown in framing Laws.*

Statutes drafted by Crown on petition of Estates.

The difficulties which arose from the mode of procedure in framing and passing laws were of a different kind. At the outset of our Parliamentary history statutes were drafted and enacted by the Crown in Council on the petition of the estates of the realm, and the first questions arose upon the necessity for the assent of all to the petitions of each.

[1] The staple was a system for the regulation of markets in certain towns, where goods were brought for sale and sold, after trial of their quality, to merchants who had a monopoly in dealing with such goods. The market and the monopoly were alike matters of royal grant, and were granted in return for contribution to royal revenue. Stubbs, Const. Hist. ii. (5th ed.) 431.

[2] Rot. Parl. ii. 253, 257.

Was it requisite that all estates should concur?

The procedure of early Parliaments is obscure, and for our purposes not very important. The date at which Lords and Commons first held separate sessions is uncertain, if indeed it is certain that they ever sat together. The fact that the baronage, the clergy, the knights, and the burgesses voted money in different proportions suggests, not two sessions, but four. At any rate, by the year 1341 [1] the clergy had ceased to attend, and the Lords and Commons sat apart. But the necessity for a concurrence in legislation of the two estates which constituted Parliament does not seem to have been recognized for some time after the Statute of Edward II had ostensibly secured the legislative rights of the Commons.

Apart from the Statute Quia Emptores passed *instantia magnatum*, which belongs to an earlier date, we may accept in proof the statement of Dr. Stubbs that 'although in 1340, 1344, and 1352 the statutes passed at the petition of the clergy received the assent of the Commons, it seems almost certain that from time to time statutes or ordinances were passed by the King at their request without such assent [2].'

The abstention of the clergy as an estate, from Parliament settled any question that might have arisen as to the need of their assent to petitions of the Lords or Commons, and throughout the fourteenth century the Commons adopted and merged the separate petitions of the 'magnates' in their own, even in matters such as the trial of peers, which exclusively concerned the Upper House.

Double capacity of peers.

The twofold duties of the peers as an estate of the realm and as councillors of the Crown make it difficult throughout the fourteenth century to discover how far their concurrence in the petitions of the Commons was needful to secure the assent of the Crown. For the King might be moved to reject a petition either because the Lords did not concur in it, sitting as a House of Parliament, or because they advised him to refuse it in their capacity of councillors of the Crown. But we may assume that with the recognition of the distinc-

[1] If Haxey was a clerical proctor as suggested by Dr. Stubbs, the clergy attended in 1397 (*supra*, p. 166): but the matter is doubtful. Stubbs, Const. Hist. ii. (5th ed.) 516 n.

[2] Stubbs, Const. Hist. ii. (5th ed.) 626

tion between Statute and Ordinance the need of concurrence of Lords and Commons in legislation was also recognized.

Ordinary process of mediaeval legislation.

Setting aside therefore these questions of initiation and concurrence, we may pass to the ordinary mode of legislation. This was by statute made on petition of the Commons. The King summoned a Parliament, partly for advice, mainly for supply. Having stated his need of a grant of money, the Commons stated their needs in the matter of legislation.

Petition.

Grievances came before supply, and the grant of money might perhaps depend upon the answers received by the Commons to their petitions. Hence the ordinary form of words intended to imply rejection was constructed so as to seem to mean merely a postponement. A favourable answer

Answer.

was couched in the words, *le roy le veult*, an unfavourable answer in the words, *le roy s'avisera*.

But an affirmative answer to their petition did not necessarily give to the Commons what they wanted in the way of legislation. The King, with the assistance of his council, might frame a law in accordance with the terms of the petition, and then this law would be engrossed in the Statute Book ; or perhaps the matter was of temporary importance and then it would be regulated by ordinance in letters patent.

Imperfect security for effective legislation.

But the wishes of the Commons were apt to be defeated in various ways even though their petitions had received the royal assent. Sometimes the matter was forgotten, or intentionally laid aside after Parliament had broken up, and then no law was made. Sometimes a law was made, but not in accordance with the terms of the petition. Sometimes the law was made in a satisfactory form, but accompanied with saving clauses which enabled the King to suspend it for a time, or dispense with its operation in certain cases.

Attempts to obtain it.

The Commons, before they realized the importance of drafting bills as they wished them to pass, attempted in many ways to secure that their petitions, when answered in the affirmative, should be made into statutes in the form and to the intent required, and free from the possibility of suspension or revocation.

They asked to have the answers of the King set forth in writing and sealed, so that they might be assured of a corre-

spondence between answer and petition. They annexed conditions to the grant of supply to the effect that the 1327.
petitions exhibited by Lords and Commons should be affirmed in the form in which they had received the King's assent. Their efforts were largely directed to procuring the 1341.
due enactment in Statute or Ordinance of such provisions as were intended to be respectively permanent or temporary, and one may suspect from the tenour of the frequent petitions of the Commons that the King was apt to employ the revocable form of Ordinance where the Commons desired the permanent form of Statute, and to issue charters or letters patent instead of entering the required provisions on the Statute Roll.

A great step was made when in 1414 the Commons demanded of Henry V that they should be 'as well Assentirs as Peticioners' and that their petitions should not be altered when put into form of law without their consent. They received for answer that:

'the Kyng of his grace especial graunteth that from hensforth no thing be enacted to the peticions of his Comune that be contrarie of hir asking wharby they shuld be bounde withoute their assent. Savyng alwey to our liege lord his royal prerogative to graunte and denye what him lust of their petitions and askynges aforesaide [1].'

The growing influence of the Commons in legislation is marked by the changes in the form of the enacting clause of statutes.

Forms of enactment.

The Statute of Westminster i. is thus described as 'Establisemenz le Rey Edward fez par son conseil e par le assentement des Erceveskes, Eveskes, Abbes, Priurs, Contes, Barons, et la Communaute de la tere ileokes somons [2].' From the year 1318 statutes are expressed to be made by the assent of the prelates, earls, barons, and the commonalty of the realm; but from the commencement of the reign of Edward III the mode of legislation upon petition finds expression in the words 'at the request of the Commons'. Sometimes both Houses are described as petitioners, as in the form 'Le

[1] Rot. Parl. iv. 22. [2] Stubbs, Select Charters (9th ed.), 442.

roy supplie feust par les Prelats, Countes, Barons, et les communaltez.'

In the 11th of Henry VI the words 'by authority of Parliament' come in, thereby placing the Houses upon a level in legislative power; and a little before that date the 'request' of the Commons begins to drop out. The enacting clauses are not uniform, but gradually throughout the reign of Henry VI statutes ceased to be enacted by the *request* of the Commons and are enacted by the *authority* of Parliament, and from the 1st of Henry VII the *request* is never revived.

§ 4. *Billa formam actus in se continens.*

The Commons draft the bills they want.

But the substantial remedy for the difficulty described above was found when, as took place in the reign of Henry VI, the Commons adopted the practice of framing their petitions in statutory form, and requested that the form should not be altered. We are told that this custom was introduced 'first in the legislative acts which were originated by the King[1]'; an early instance of its adoption by the Commons is to be found in the Parliament Rolls of 1429, when they ask that 'the Bille which is passed by the Communes of yis present Parliament; hit lyke unto ye king by yadvys of the Lordys Spirituell and Temporell in yis present Parlement, yat graciously hit may be answerd after the tenure and fourme yerof[2].'

There is a further indication of the change in the not unfrequent use of the expression, 'billa formam actus in se continens[3]': meaning that the 'bill', which in Parliament, as in the Chancery, was the usual vehicle for a petition, did not contain a petition only, but the scheme or draft of a statute.

Effect of this change.

And the process of legislation by bill presented for the acceptance or rejection of the Crown did much more than help to formulate Parliamentary procedure, or to secure the due effect of the royal assent to a petition. It established

[1] Stubbs, Const. Hist. iii. (5th ed.) 480. [2] Rot. Parl. iv. 359.

[3] The phrase perhaps survives in the modern heading of a bill sent from the Commons to the Lords 'A bill intituled an Act.'

the distinction between Executive and Legislature, the Crown in Council and the Crown in Parliament.

Increasing power of Parliament.

For until this mode of legislation came into practice, the Houses had petitioned the Crown for the redress of public grievances, just as the suitor petitioned the Crown in Chancery for the redress of a private and individual grievance. These petitions were presented before the grant of supply, and the words, still in use, by which the King expressed his assent or dissent, were so framed as not to imperil the grant if he disapproved of the proposed legislation. But this meant that the legislative act came from the Crown, and though Lords and Commons might complain of legislation which was not initiated or embodied in their petitions, yet all laws were left to the Crown to make, and depended for form and time of making upon the pleasure of the Crown.

The Houses frame the laws.

But when the Houses of Parliament took into their own hands the drafting of Statutes, their demands for legislation became definite and urgent; the laws which they desired to see made could not be varied, though they might be nullified or postponed. They no longer asked the King to assent to the making of a law on a given subject, and then to make one, but they asked him to say 'yes' or 'no' to the passing of a law drawn in the form in which they wished it to pass, and no longer admitting of amendment.

The King assents or dissents.

Henceforward if the Crown took independent legislative action, such action was unwarranted by law or by custom. For Statute, as we have seen, made the two Houses necessary parties to legislation, and the form which legislative procedure had now assumed reduced the share of the King to a formal assent or dissent. If the King chose to legislate independently of Parliament it could no longer be alleged that he was merely carrying out what he believed to be the purpose of a petition in the customary form.

§ 5. *Commencement of modern procedure.*

Course of a Bill in Commons.

When an intended statute was no longer suggested to the King in the shape of a petition for legislation, but was presented in the terms in which the Houses desired to place

it on the Statute Book, a fuller discussion and more precise rules of procedure became necessary.

There is a gap in our sources of information between the close of the Rotuli Parliamentorum and the commencement of the Lords' Journals with the reign of Henry VIII and of the Commons' Journals with that of Edward VI.

Three readings.

But as soon as the Journals begin we find the three readings in each House; and in Elizabeth's reign the Committee stage after a second reading becomes a regular practice. But the Committee to which a Bill was referred was what we should now call a Select Committee, a few members

Committee stage.

chosen to consider the Bill and report upon it. Thus in 1571 the Bill to relieve burgesses from residence in their constituencies was referred to a Committee of nine, who were instructed to meet on the following Friday at the Temple Church. In the next reign Committees were larger, but what is described in the Journals as a 'General Committee' was not a Committee of the whole House. It was,

Committee of whole House.

at least in some cases, a Committee open to the whole House, but those who attended without having been placed on the Committee had no votes. Nor were any placed on the Committee who had previously spoken against the Bill [1]. Early in the reign of Charles I the practice of referring Bills to Committees of the whole House [2] came into use, and from that time onwards procedure has varied little until very recent times. The second reading of a Bill had been

Select Committee.

followed as a general rule by its reference to a Committee of the whole House, less commonly to a Select Committee whose consideration of the Bill was not a substitute for the subsequent discussion in Committee of the House.

Standing Committees.

In 1882 two Standing Committees were introduced for Law and Trade, intended for the discussion of such measures of legal or commercial change as were uncontentious in character though needing careful scrutiny in detail. As time went on measures were referred to these Committees which were neither uncontroversial, nor specially concerned with Law or Trade, and in 1907 reference to a Standing

[1] Hakewill, Modus Tenendi Parliamentum, p. 146.

[2] 'All that will come to have voice.' Com. Journ. ii. 877.

Committee became the rule except in the case of money bills and provisional order bills. Unless the House otherwise order, a Bill now goes as of course to one of the six Committees constituted under the Standing Orders of the House [1].

Object of procedure.

The history of Parliamentary Procedure has been well told elsewhere [2]. Here it is enough to indicate some of the features which mark its progress.

Until the commencement of the nineteenth century the rules of the House of Commons were constructed with two objects in view. One was to protect the House from hurried and undiscussed action pressed forward by the King's ministers. The other was to secure fair play between the parties in the House and a hearing for all.

Fear of royal influence.

We must recollect that until the eighteenth century was fairly well advanced the Speaker was a nominee and a minister of the Crown, and that the use of Committees of the whole House in the seventeenth century is not unconnected with the desire to transact business under the chairmanship of an independent member.

The Leader of the House might be even more at the service of the Crown than the Speaker ; and this not merely in the sense that every minister is the King's servant, but as using his position to give effect to the personal wishes of the King. When Henry Fox accepted that position in order to carry the Peace of Paris he thus explains the situation. 'His Majesty was in great concern lest a good peace in a good House of Commons should be lost and his authority disgraced, for want of a proper person to support his honest measures. . . . In short I am a Cabinet Councillor, and *His Majesty's Minister in the House of Commons* [3].'

Desire for full discussion.

The House therefore did well to secure every opportunity for discussing matters the discussion of which might be unwelcome to the King and his ministers, and the Orders of the House were more calculated to promote freedom of speech than the transaction of business. It was not until

[1] Standing Orders, 46–50 ; *post*, p. 272.

[2] For an exhaustive treatment of this subject the reader is referred to Dr. Redlich's History of Parliamentary Procedure in England.

[3] Bedford Correspondence, iii. 134.

Need to limit this.

1811 that the Government obtained precedence for their business on certain days. The history of our procedure since that time is a record of successive reductions of the time during which private members may introduce the discussion of matters outside the range of Government business, of successive limitations of opportunity for raising general questions at the various stages of Government business, and at last of the time allowed for discussing at all the matters which a Government desires to carry through the House.

Difficulties of modern procedure.

Apart from organized obstruction, which began rather more than forty years ago, there is no doubt that the subjects proper for discussion have enormously increased in number and that at the same time the number of members who desire to discuss and are capable of discussing these subjects has also very largely increased, while the number of hours in the day, and the general conditions and external interests of life, remain the same.

Possible remedies.

The remedies do not seem to be more than three in number: to reduce the subjects for discussion by some process of delegation; to reduce the length of discussion by a time limit upon speeches; to reduce the opportunities for discussion by rules which curtail the occasions on which debate may take place, and the period for which debate may last.

The last of these remedies has been applied during the last twenty years by the Government of the day, and, until the war intervened, with ever-increasing severity. It is unfortunate that a process originally devised to meet organized obstruction should be used as a method by which the pressure of business can be lightened or relieved. The closure in its different forms must be reserved for discussion at a later stage. It is only necessary here to indicate the steps by which our legislative procedure has reached its present form.

Section II

ORDINARY PROCEDURE OF THE HOUSE. PUBLIC BILLS

§ 1. *The Business of each day.*

A day's work.

To understand the course of a Public Bill on its way to become law it is well to get some notion of the everyday procedure of the House of Commons.

Business of Government and private members

It should be premised that when the House gets to the Orders of the Day, Government business, as a rule, takes precedence of private members' business. The exceptions are these. From the meeting of Parliament until Easter, private members occupy the hours from 8.15 p.m. to 11 p.m. on Tuesdays and Wednesdays, and the whole of the short Friday sitting. After Easter Government takes the whole of Tuesday, and after Whitsuntide the whole time of the House, except the third and fourth Fridays after Whit Sunday.

Let us now take the events of an ordinary day in the House of Commons.

Prayers.

At 2.45 p.m. on the first four days in the week, the Speaker, accompanied by the Chaplain, preceded by the Serjeant-at-Arms with the mace and followed by his train-bearer, enters the House and advances to the table. Prayers are read: the Speaker then takes the chair and the mace is laid upon the table.

Speaker in the chair.

The Speaker's chair is at one end of the House, facing the door; in front and below sit the three clerks at the table. On either side four rows of benches run the length of the House, with a gallery above. Half-way down on each side runs a gangway dividing the rows into two blocks, above and below the gangway.

On the right hand of the Speaker sit the supporters of the Government, ministers occupying the front bench above the gangway. On the left sit the Opposition, and the Independent groups. Ex-ministers who are members of

the Opposition sit on the front bench opposite to ministers.[1]

Around the House on either side run the lobbies through which members pass for a division, the Aye lobby to the right of the Speaker, the No lobby to his left. There is access to these on either side of the door of the House, and from a door behind the Speaker's chair, and from side doors.

The Speaker having taken the Chair, the business of the day commences, in the following order :—

Private business.

Private business is first dealt with. This means private bill legislation, of which more hereafter. A quarter of an hour is allowed for this, and all business not concluded by 3 p.m. stands over to a time to be fixed by the Chairman of Ways and Means.

Questions.

Questions come next. These are an important feature of our Parliamentary procedure. They are inquiries addressed to ministers of the Crown, or to members concerned with the business of the House.[2] These questions should not be argumentative but so framed as merely to elicit the information asked for. Supplementary questions arising out of the minister's answer, but not passing beyond the purport of the question, are permitted, but no discussion is allowed.

Oral and written answers.

Notice must be given of all questions by handing them in to the clerk at the table, so that they may appear on the notice papers of the day on which they are asked. If an oral answer is desired the member who hands in his question must mark it with an asterisk ; but the written answers to unstarred questions also appear in the official report of the day's proceedings.

Notice as above described may be dispensed with in matters of urgency and importance where private notice is given to the minister concerned, or where the Leader of the House is asked about the course of business.

[1] During the War, when no regular Opposition existed, leading Privy Councillors who were not members of the Government occupied this bench ; and during the present Parliament the leaders both of the Independent Liberal Party and Labour Party sit there, together with one or two Privy Councillors who do not belong to those parties but who have ceased to support the Government.

[2] For example, the Chairman of the Kitchen Committee.

At 3.45 questions cease, and those which are not reached by that hour are answered in writing by the ministers to whom they are addressed.

The Adjournment,

Motions for the adjournment of the House. Questions become more important as the opportunities of the private member for raising discussion are curtailed, and they may furnish an opportunity for discussion if the minister's answer should bring out matter of new and pressing interest. Such a matter need not necessarily arise out of a question, but in either case it is open to a member at the close of question time to move the adjournment of the House 'for the purpose of discussing a definite matter of urgent public importance', in which the conduct of ministers is involved.

how moved.

But it does not follow that he will be able to make his motion. The Speaker will first determine whether the matter is definite and urgent, and then the motion must be supported by not less than forty members standing up in their places. If fewer than forty and more than ten stand up, a division may be taken without debate on the question that the motion should be made.

If the member is successful he brings on his discussion on the same day at 8.15 p.m.

Petitions.

Public Petitions. These are sent up by localities or bodies of persons to a member for presentation. They deal with some matter of general interest.

There will be more to say about Petitions in the concluding chapter of this book. Their presentation is now merely formal, and may be effected by putting the petition in a bag which is kept for the purpose behind the Speaker's chair. But if the member pleases he may present the petition publicly, after question time, stating whence it comes, the number of signatories, the material allegations, and the prayer of the petition. Its subsequent fate must be dealt with later.

Returns.

Unopposed returns are motions for accounts or papers to be laid before the House. If the department concerned raises no objection they come on here.

Leave of absence,

Motions for leave of absence. These were of importance in the sixteenth and seventeenth centuries, when constituencies had little chance of knowing whether their

members were discharging their duties, and when members were not entitled to their wages if they went away before the end of the session without a licence from the Speaker. The practice of asking for leave of absence cannot be said to have wholly fallen into disuse, for as lately as May, 1900, a member asked and obtained a week's leave [1]. But attention was called to the fact that many members habitually absented themselves for more than a week, without leave, and absence is now a matter which concerns the Whips and the constituencies rather than the House.

There seems no doubt, however, that non-attendance after leave of absence refused might be treated as a contempt of the House, and refusal to attend a Committee has, in comparatively recent times, been so treated and the offending member placed in the custody of the Serjeant-at-Arms [2].

and call of the House.

Another disused method of enforcing attendance is a *call of the House*, disobedience to which without excuse might lead to commitment and such sentence as the House chose to inflict. But there has been no call of the House since 1836, nor motion for a call since 1882.

Notices of motion.

Giving notices of motion comes next in order. Members of the Government can give notice of any motion they propose to bring forward affecting public business, but private members must ballot for priority, and this takes place before the House enters on the business of the day. The rules affecting this matter are too technical to be discussed here: it is enough to say that it is in this manner that the time allowed to private members is allocated among them.

Before entering on the orders of the day motions for the appointment of Select Committees and for leave to bring in bills may be set down for consideration.

Modes of introducing a bill: formal,

A bill may be introduced in any one of three ways [3]—

(*a*) A member may present it at the table after notice

[1] 82 Hansard, 4th Series, p. 1231.

[2] Case of Mr. Smith O'Brien: 85 Hansard, 3rd Series, p. 1291; and see the case of Mr. J. P. Hennessy, 156 Hansard, 3rd Series, pp. 1931, 2213.

[3] See, however, *post*, p. 289, note 1.

but without any order of the House for its introduction. It is then deemed to have been read a first time.

under ten minutes rule,

(*b*) Motion for leave to bring in a bill may be set down for the commencement of public business. If opposed, brief statements from the introducer and opponent of the bill may be made, with leave of the Speaker, and the question is then put that leave be given. This is known as bringing in a bill 'under the ten minutes' rule.'

the Orders of the Day.

(*c*) The motion for leave to introduce a bill may be an Order of the Day, in which case it comes on as hereinafter described.

We may now suppose that all this preliminary business has been transacted, and that the sitting is one at which Orders of the Day have precedence of Notices of Motion [1]. The Speaker then calls on the Clerk to read the Orders of the Day. We may assume that the day is an uneventful one, whether it be wholly devoted to Government business or whether notices of motion by private members come on at 8.15. Contentious business ends at 11 p.m., and the outstanding orders of the day are then gone through; a future day is named by one of the Government whips in the case of Government bills,—by the member interested in the case of a private member's bill. The Speaker then adjourns the House without question put, unless a finance bill be under discussion, or unless the standing orders of the House have been suspended for the purpose of concluding or advancing a particular measure.

§ 2. *A Public Bill in the Commons.*

When a bill first comes before the House it must come, as has been seen, in the form of a notice of motion. A bill may take its origin from the Lords or the Commons, but it will be convenient to trace it through its progress to the maturity of a Statute, beginning, as most important bills begin, in the House of Commons. We can note afterwards what happens when a bill takes its origin in the House of Lords.

[1] This is the case at all sittings except those which commence at 8.15 p.m. on the Tuesdays and Wednesdays assigned to private members.

Motion for leave to introduce a bill.

The member who desires to introduce a measure gives notice, as above described, of his intention to do so. Usually this is no more than a form, but on important occasions the purport of the bill is explained on its introduction; when the introduction of a bill is opposed a discussion sometimes of some length may take place, and a division may be taken as to whether leave should be given to introduce it. If the motion is carried an order of the House is made that the bill be prepared and brought in by the mover and other members named by him. The bill is then immediately presented; the member in charge appears at the bar, the Speaker calls upon him by name, he calls out, 'A bill, Sir,' and is desired by the Speaker to bring it up. He brings it to the table, and delivers it to the Clerk of the House, by whom its title is read aloud. The questions that a bill 'be now read a first time,' and that it be printed, are put without amendment or debate, and an order is made that it be read a second time on a day named.

First reading.

Second reading.

The bill then takes its place among the orders of the day, and when the second reading comes on in due course a motion is made and question put 'that the bill be now read a second time.' This is the point at which the general principle of the bill is most fully discussed and its fate decided.

An opponent may move that the bill be read a second time that day six months, which shelves it for the Session, or may meet the motion that the bill be now read a second time with a direct negative, which shelves it for the day, or may move, by way of amendment to the question, resolutions which affect or alter the character of the bill.

These are all civil ways of rejecting a bill: but there are precedents for a bill being rejected, and torn in the House: and in 1772 a bill was rejected, thrown over the table by the Speaker, and kicked out of the House by members. The offence of this particular bill was that it had been returned from the Lords with an amendment to a money clause [1].

The bill committed

When a bill has passed the second reading it is committed to one of the six Standing Committees appointed by the

[1] Parl. Hist. vol. xvii. p. 515.

Committee of Selection. Scottish bills go to a Committee consisting of all the Scottish members with not less than ten nor more than fifteen additional members nominated by the Committee of Selection. Each of the other Committees consists of not less than forty and not more than sixty members, but the Committee of Selection have power to increase this number by fifteen. The Committee which considers Welsh bills is constituted so as to comprise all the members for Wales and Monmouthshire. The Committee of Selection also appoints a panel of chairmen, not less than eight nor more than twelve in number, who choose from among themselves the chairmen of these six Committees.

to Standing Committee,

To the general rule of reference to a Standing Committee there are three sets of exceptions, and in these cases the Bill is referred to a Committee of the whole House.

The exceptions are :—

to Committee of whole House.

(*a*) Bills for imposing taxes, or Consolidated Fund or Appropriation Bills [1].

(*b*) Bills for confirming Provisional Orders [2].

(*c*) Bills which the House, on motion made directly after the second reading, has decided to retain for Committee of the whole House.

The consideration of a public bill is only one of several purposes for which a Committee of the whole House may be set up. Such a Committee is set up every session for supply, and for ways and means. Here we only need to note the points of procedure which distinguish the Committee of the whole House and the Standing Committee in their consideration of public bills, and the points which they have in common.

When a bill is committed to the whole House the Speaker leaves the chair without question put on each occasion that the bill is one of the Orders of the Day. The Chairman of Committees takes his place ; if discussion is not concluded at

[1] See sect. iii of this chapter. In 1919 the Estimates (with certain exceptions) were, under a special sessional order, referred to a Standing Committee for consideration ; but this has not been repeated. There is, however, a Select Committee on Estimates with quite different functions (*post*, p. 290).

[2] See *post*, p. 316.

Procedure in Committee.

the end of the sitting, the Chairman reports progress and asks leave to sit again. A Standing Committee usually meets in the morning, fixes its own hours of sitting, and adjourns, at the close of a sitting, to a day and time chosen by itself. Since 1919 it may sit while the House is sitting and during an adjournment.

Instructions.

It is open to the House on the motion of a member to give *instructions* to either sort of Committee. There is a general instruction given by Standing Order to all Committees to make any amendments relevant to the bill. The special instructions given by order of the House must be of a very limited character, they must be such as enable the Committee to do something which it would not otherwise be able to do without going beyond the scope and framework of the bill[1]. In all Committees members may not only move all relevant amendments, but may speak more than once in support of amendments moved, or in opposition to them.

Discussion.

The bill is dealt with clause by clause, and new clauses, if proposed to be added or introduced, are not discussed until the existing clauses have been considered.

Report.

When the bill has gone through Committee the Chairman reports it to the House, and an order is made that the bill, as amended, be considered. This is called the Report stage of the bill. The Speaker is in the chair, further amendments may be made and new clauses added. At this stage no one can speak more than once, except the member in charge of, or the mover of an amendment to a bill brought from a Standing Committee[2]. If amendments are complicated in character, or if a further money resolution is required[3], the bill may be recommitted.

Third reading.

When the bill has passed through the Report stage, a motion is made and question put that the bill be read a third time; this being carried the House orders that the clerk 'carry the bill to the Lords and desire their concurrence' and the bill is endorsed with the words 'soit baillé aux seigneurs.'

[1] A ruling of Mr. Speaker Whitley has very much limited the scope of instructions: 147 Parl. Deb. 5th ser. 873 (26 Oct. 1921).

[2] Standing Order, 46. [3] See as to money resolutions, *post*, p. 289.

Limitations on debate.

But certain powers as to limitation of debate rest with the Speaker, the Chairman, or with the majority subject to the sanction of Speaker or Chairman, and these must be noted.

Irrelevance.

Irrelevance or repetition may be stopped by Speaker or Chairman, who may first call the attention of the House or Committee to the conduct of a member and then direct him to discontinue his speech.

Delay.

Dilatory motions that the House adjourn, or that the Committee report progress, may be put without debate by Speaker or Chairman; or he may decline to put such motion at all, if he thinks that it is moved for purposes of delay and in abuse of the rules of the House.

Disorder.

A member whose conduct is grossly disorderly may be ordered by the Speaker or Chairman of Committee of the whole House to withdraw at once from the House. If he refuse he may be *named*.

So far applicable to individuals.

If a member is named by the Speaker for disregarding the authority of the chair or for persistent and wilful obstruction, a motion is made—usually by the leader of the House—that the member be suspended from the service of the House. If the offence take place in Committee the Chairman suspends the work of the Committee, the Speaker takes the chair, the matter is reported to him, and the same procedure follows. The question of suspension is put to the House without amendment or debate [1].

So much for the restraint which the House can place upon the speech of individual members. But the Speaker may adjourn the House without question put in cases of grave and continuous general disorder [2]: and the majority, with the assent of the Speaker or Chairman, can exercise a very wide power in the limitation of discussion under the rules relating to *closure of debate*.

Closure.

The existence of the Closure dates from 1881, when the methods of obstruction to business devised by the Irish Nationalist party had reached a perfection which threatened to reduce Parliamentary government to a nullity. Beginning with temporary expedients, in the nature of Urgency

[1] The Chairman of a Standing Committee does not possess these powers of suppressing gross disorder.

[2] Standing Order, 21. (Feb. 1902.)

The Closure.

Resolutions, the Closure took its place in the Standing Orders of the House in the autumn Session of 1882, and assumed its present form in the Standing Orders of 1888.

'After a question has been proposed, a member rising in his place may claim to move "that the Question be now put," and unless it shall appear to the Chair that such motion is an abuse of the Rules of the House, or an infringement of the rights of the minority, the Question "that the Question be now put" shall be put forthwith and decided without amendment or debate [1].'

A debate then pending may thus be brought to an issue, and if the motion is carried in Committee or on Report the discussion of a bill may be further accelerated by another provision of the same Standing Order, whereby a member may move with the assent of the chair that certain words of a clause stand part of the clause or that the whole clause stand part of the bill. The closure can only be carried if the number voting in the majority be not less than 100. These rules are applicable to Standing Committees [2], but with the substitution of 20 for 100.

The 'kangaroo' closure.

In 1919 what is sometimes known as the 'kangaroo' closure was made part of the regular procedure of the House. The Speaker and the Chairman of Ways and Means have now the power, when any bill is under consideration in committee or on report, to discriminate among the amendments and new clauses which appear on the notice paper and to select those which are to be discussed [3]. The exercise of this power is a delicate and responsible function, but much parliamentary time is saved by the selection for discussion of those clauses and amendments only on which debate is likely to be profitable [4].

[1] Standing Order, 26. (March 1887 and 1888.)

[2] Until 1902 the closure could only be moved if the Speaker or Chairman of Committees was in the chair. The power was extended to the Deputy-Chairman in 1902 and to the Chairmen of Standing Committees in 1907.

[3] Standing Order, 27a (Feb. 1919). A Standing Order of 1909 had allowed a motion to be made giving this power to the chair on particular occasions.

[4] 'Of all methods of restricting debates which the wit of this House has hitherto devised, the least blind, the most considerate and the most intelligent is the kangaroo closure': Mr. A. Chamberlain on 6th July, 1921; 144 Parl. Deb. 5th Series, 455. Mr. Asquith assented to this description.

The guillotine.

A far more drastic mode of limiting debate and accelerating business is what is known as 'closure by compartments,' or 'the guillotine.' By this process certain periods of time are allotted, by resolution of the House, to various portions and stages of a bill; at the expiration of each period of time, discussion, whether concluded or not, is closed, and the majority carry that portion of the bill upon which the guillotine has fallen.

How used.

The process can only take place by order of the House, embodied in a series of resolutions allocating the time to be given for debate on the parts and stages of a bill; and when first introduced was only employed when it had become plain that without exceptional procedure a bill could only be passed, if at all, by an unusual and inconvenient extension of the Parliamentary Session [1].

It had become before the war a recognized (and in the opinion of high authorities an essential [2]) part of our procedure where an important Government bill was reserved for discussion in Committee of the whole House. In 1914 it was even extended to the Finance Bill of that year. Before a Bill went into Committee, and therefore before there was any evidence that discussion was likely to be prolonged, fixed periods were assigned for debate on the Bill, and security thus taken that it would have passed through the House by a given date. The war, however, brought about a change. The suspension of party warfare made the guillotine unnecessary [3], and a proposal to revive it in 1920 in the case of the Government of Ireland Bill was unfavourably received. Recourse was had to it in two cases in 1921, but in one of them only for the purpose of the report stage of the bill; and it is clear that the House of

[1] This procedure was first used in 1887, and applied to the Criminal Law and Procedure (Ireland) Bill when that bill had been in Committee for sixteen days. It was used in the case of the Home Rule Bill of 1893 after twenty-eight days passed in Committee, and in that of the Education Bill of 1902 after thirty-eight days of the Committee stage. See Mr. Balfour's sketch of the history of the guillotine, 197 Hansard, 4th Series, p. 999.

[2] See Mr. Asquith's speech, 25th Oct. 1911; 30 Parl. Deb. 5th Ser. 120.

[3] The Military Service Bill, 1918, urgently required at a moment of crisis, was the only case during the war.

Commons would not at the present time (1922) accept the former view that the business generally of the House cannot be carried on without it. Yet it would be hazardous to predict that in a future Parliament in which parties are more evenly divided, the Government of the day may not feel themselves compelled to resort once more to the guillotine for the purpose of carrying through a legislative programme, though it will probably be long before the drastic methods of the years immediately prior to 1914 are revived.

Why necessary.

Since the closure and (to a lesser extent) the guillotine are now accepted as features of our Parliamentary procedure it is worth asking what have been the causes which led to their introduction, and how they have affected the character of debate and the relations of parties.

Until the middle of the nineteenth century our rules of procedure were so framed as to provide almost unlimited opportunity for discussion. In reading the reports of the Committees which sat in 1848, in 1854, and in 1861, it is clear that the transaction of business under the rules of that period was only made possible by what Dr. Redlich has happily described as 'the self-imposed parliamentary discipline of the parties.' In 1847 there were eighteen stages of a bill at which general discussion was possible, and if the bill was in Committee for more than one day, debate could arise every time on the question 'that the Speaker leave the chair.' The Orders of the Day could not be reached without the possibility of a debate on the question that the Clerk do now proceed to read the Orders of the Day, and dilatory motions for the adjournment could be made without restraint[1].

Congestion of business.

Slowly, and almost reluctantly, these opportunities of discussion were reduced to a level at which the transaction of business became possible; but the increasing area of subjects for debate, and the increasing desire of members to take part in a debate, necessitated further change. It was not enough to limit opportunities for discussion, discussion itself must be curtailed.

Obstruction.

The recognition of this need might have been longer

[1] See Reports of Committees. 1847–8, vol. vii, p. 157; for 1854, vol. vii, p. 73; for 1861, vol. xi, p. 434.

delayed had there not arisen a party in the House who not merely declined to be bound by the usage or comity of the House, but who set themselves deliberately to bring business to a standstill, and the House itself into contempt.

Even under this provocation the closure was reached by very gradual steps; and yet it must be admitted to be a necessary and useful instrument.

Effects of closure,

Two effects are noticeable: the exercise by the majority of the power of bringing discussion to a close tends inevitably to accentuate party differences: and the use of the closure compels the House and individual members to pronounce decidedly on questions which many may regard as not yet ripe for decision. Formerly an abstract resolution moved, or a bill introduced, by a private member was apt to be talked out, and the House by prolonging discussion to the limit of the time available escaped committing itself to a principle on which the minds of many were, as yet, in doubt. Now, after a discussion of several hours, the closure is moved and granted, and if carried the question must be put, and men must vote for or against it or deliberately evade a conclusion by abstaining from the division.

compared with guillotine,

This relates to the simple closure, but there is a marked distinction between the ordinary closure and closure by compartments, or the guillotine, in respect of the protection afforded to the minority. The Speaker or Chairman will always refuse the closure if he thinks that the question at issue has been insufficiently discussed, or that the rights of the minority are in any way infringed. In the use of the guillotine there is no such protection. The Government produce their programme for the allocation of time, it is carried with the aid of their majority, and however insufficient may be the time allowed for discussion of any part of the bill in question, the closure falls automatically at the end of that time, without the leave of Speaker or Chairman, and with no appeal.

on rights of minority,

on character of debate,

Since the Government have mapped out the time for discussing the various parts of the bill, the Opposition are not unnaturally desirous of showing that in this, as in other things, the Government are wrong. They are therefore not

by any means disposed to accommodate discussion to the Government scheme. Apart from this it is inevitable that a Government, anxious to get business done, should be oversanguine in their estimate of the time within which contentious matters can be discussed: and if there should be miscalculations as to the importance of clauses, or as to the importance which members may attach to particular provisions of a bill, the time table is falsified, and the fall of the guillotine cuts short or precludes discussion[1]. The result is not satisfactory, and detracts from the importance of debate in the Commons. If parties were near to an equality in numbers, and party organization allowed greater latitude to individual opinion, some interest would assuredly be felt in debates on which the fate of a ministry might depend. But when the result of discussion is known beforehand, and argument is met by silence in the House, and by numbers in the division lobby, the public take little interest in speeches which merely serve to postpone a foregone conclusion.

on importance of House of Commons.

It is not to be denied that some allocation of time for discussion is on occasion essential to the conduct of business, and in such cases the temptation will always exist to make the necessary machinery as effective for its purpose as possible. But it is no less true that since the war it has come to be recognized that means must be taken to ensure, by previous consultation, that the rights of the minority are respected, and that time is given for the debate of important features of a bill. The defects, however, such as they are, in the present rules of procedure owe their worst features to the congestion of business in the House of Commons and cannot be remedied by a mere change in the Standing Orders[2].

Moderating influence of the war.

[1] It is, however, noteworthy that there were occasions during the discussion on report of the Railways Bill in 1921 when the debate had concluded before the expiration of the allotted time.

[2] In the last edition of this book the author discussed the probable effect of the Parliament Act upon debate in either House, expressing himself as uncertain whether debate in the House of Commons would become more important because it was the only debate which could affect the issue, or whether a majority, knowing the measure which it supported must pass,

Section III

Money Bills

§ 1. *History and General Rules.*

General rules as to money bills.

Legislation which has for its object the grant of public money, or the imposition of burdens upon the taxpayer, possesses some special features which require to be specially noted.

In the first place such legislation is under the entire control of the House of Commons.

A bill relating to Supply must begin in the House of Commons. It is formulated there, it no longer needs the concurrence of the Lords, nor can it be amended by them on its way to receive the royal assent.

In the second place such legislation only takes place on recommendation from the Crown.

In the third place such legislation must commence in a Committee of the whole House.

History.

We need not trace this right further back than the reign of Richard II, when, as Dr. Stubbs tells us, it became the practice 'that all grants should be made by the Commons with the advice and assent of the Lords, in a documentary form which may be termed an act of the parliament[1].'

The right seems on one occasion to have been disregarded by Henry IV, though not from any design to override the privileges of the Commons, with the result that the Commons obtained, after a remonstrance, a formal recognition that the grant was theirs. Henry IV, in the year 1407, commenced the financial business of the Session by a discussion with the Lords as to the probable requirements of

might be impatient of discussion and willing to submit to drastic measures of closure. The exceptional circumstances created by the war still make it difficult to hazard an opinion on the point, but it may be observed that in 1912 the two Bills which afterwards became law under the machinery of the Parliament Act as the Government of Ireland Act, 1914, and the Welsh Church Act, 1914, were discussed under drastic guillotine resolutions, and, as already mentioned, even the Finance Bill of 1914 was so treated. Before the war, therefore, it could scarcely be said that the situation had been materially altered by the passing of the Act, at any rate in the House of Commons.—Ed.

[1] Const. Hist. iii. (5th ed.) 476.

the service of the year, and the Commons were summoned to be told the result of the discussion. The Commons complained of the prejudice to their liberties which this action involved, and the King at once gave way, and while maintaining the right of the Lords to deliberate with the King on the needs of the kingdom, decided that neither House should make any report to the King on a grant made by the Commons and agreed to by the Lords, or on any negotiations concerning the same, until both Houses were agreed, and that the report should then be made by the Speaker of the House of Commons, 'par bouche de Purparlour de la dite Commune[1].'

Commons claim to be necessary parties to grant,

Until the reign of Charles I the grant was not recited in the preamble of the act which legalized the subsidies as the grant of the Commons alone, but in the year 1625, in the act 'for the grant of two intire subsidies granted by the Temporality,' it is 'your Commons assembled in your High Court of Parliament' who grant the subsidies[2].

then that the grant is theirs,

So far the Commons claimed that the grant of supplies should be regarded as theirs; later in the seventeenth century they went further and denied the right of the House of Lords to interfere by amendment or alteration. They resolved in 1671, 'That in all aids given to the King by the Commons, the rate or tax ought not to be altered[3],' and again in 1678, 'That all aids and supplies, and aids to his Majesty in Parliament, *are the sole gift of the Commons*: and all bills for the granting of any such aids and supplies *ought to begin with the Commons*: and that it is the undoubted and sole right of the Commons to direct, limit and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants: *which ought not to be changed or altered by the House of Lords*[4].'

that Lords must not amend,

Thus far the Lords would appear to have retained the right of rejection, and this, though rarely exercised, had been admitted, specifically, in 1671, and was not disputed until 1860.

may not reject.

[1] Stubbs, Const. Hist. iii. (5th ed.) 63 and Rot. Parl. iii. 611.
[2] 1 Com. Journ. 806.
[3] 9 Com. Journ. 235.
[4] 9 Com. Journ. 509.

In the meantime the conditions under which supplies were granted had changed in some important particulars. In the time of Charles II the income of the Crown was supposed to meet the ordinary expenses of government. If a special need arose the King asked for supply to meet the need, the Commons, if they granted the supply, imposed a tax calculated to bring in the sum required. The resolutions of 1671 and 1678 denied the right of the Lords to alter the source, amount, or disposition of the money so granted, though they might admittedly reject the whole.

But in 1860 the taxes of the year, though they might be included in separate bills, formed part of a financial scheme for the service of the year. To reject one of these bills was, in effect, to amend the scheme of the Chancellor of the Exchequer, and this was what happened in 1860. In that year the Commons, among other provisions for the supplies to be granted, made a readjustment of taxation, increasing the property-tax and stamp-duties and repealing the duty on paper. The Lords assented to the bills providing for the proposed increase of taxation, but when the bill for the repeal of the paper duties came before them they rejected it.

Resolutions of 1860.

The Commons met this action on the part of the Lords by resolutions which set forth the privileges of the House in the matter of taxation, and which, while they did not deny that the Lords might have a power of rejecting money bills, intimated that the Commons had it always in their power so to frame money bills as to make the right of rejection difficult, if not impossible, to exercise [1].

6 July, 1860.

Practical effect was given to this intimation in 1861. From that year onwards it became usual to embody the financial measures of the year in one bill, which the House of Lords could not reject without bringing the finance of the year to a standstill.

Their expansion in practice.

There can be no doubt that the principle of these resolutions expanded, and that the Commons came to regard as a breach of privilege not merely the imposition by the Lords of any charge by ways of rates or taxes, but any dealing

[1] 159 Hansard, 3rd Series, p. 1383; and see the debate on the Finance Bill of 1894: 27 Hansard, 4th Series, p. 253.

with the regulation or administration of such a charge : and this in measures not primarily financial but mainly concerned with social changes.

The Finance Bill of 1909.

But the question as to the power of the House of Lords to deal with the finance of the year came to an issue in 1909, and has been settled by the Parliament Act of 1911.

It may fairly be maintained that the Finance Bill of 1909 contained matter which was not strictly financial ; and there was no doubt that leading members of the Government ascribed to it effects of a far-reaching social and political character. But when the House of Lords declined to give the Bill a second reading until an opportunity had been allowed to the electorate to pronounce an opinion, they raised issues of far greater importance than the merits of the Finance Bill. These are dealt with elsewhere.

The Parliament Act.

It is enough here to say that a bill which the Speaker holds to be a Money Bill within the terms of § 1 (2) of the Parliament Act, if passed by the House of Commons and sent up to the House of Lords not less than one month before the end of the Session, must be passed by the Lords within one month of its reaching their House, or it will be presented for the Royal Assent and become an Act of Parliament without the consent of the Lords.

Although in the consideration of the constitutional rules which relate to money bills the exclusive right of the Commons to deal with such bills is the topic most frequently dwelt upon, the second rule which we have to note can hardly be said to be less important.

Money only granted on recommendation from the Crown.

No petition for any sum relating to the public service, nor any motion for a grant or charge upon the public revenue, whether payable out of the Consolidated Fund, or out of moneys to be provided by Parliament, will be received or proceeded with unless recommended from the Crown[1].

The House, therefore, while it can determine the amount of money which shall be granted and the sources from which that money shall be drawn, has absolutely precluded itself from determining that any money shall be granted

[1] Standing Order, 66.

at all, unless the proposal for a grant emanates from the Crown.

The responsible advisers of the Crown, the ministers of state, are alone capable of proposing that public money should be raised, or if already raised should be spent; and the House would not entertain a motion by a private member for a specific outlay on any object which he might consider deserving of public support. The relations of Crown, Lords, and Commons in respect of money grants cannot be better stated than in the words of Sir Erskine May:—

'The Crown demands money, the Commons grant it, and the Lords assent to the grant; but the Commons do not vote money unless it be required by the Crown; nor impose or augment taxes, unless such taxation be necessary for the public service as *declared by the Crown through its constitutional advisers*[1].'

No private member may propose specific grant.

It is possible for any member of the House of Commons to move a resolution to the effect that public money might profitably be expended upon purposes specified in the resolution; and if the House agree to the motion it thereby commits itself to a general approval of such an outlay. But it would not be in accordance with the rules of the House for a private member to move that a specific sum be granted for a specific purpose; such a motion can only proceed from a minister of the Crown. For it cannot be too strongly impressed upon the student of constitutional law, that all the money spent upon public service is spent by the Crown; that all the money granted for the public service is granted by the Commons and that the Commons have imposed upon themselves a rule that they will not grant a penny unless it is asked for by a minister representing the Crown for a purpose specified in the terms of his request.

Such a rule is the great safeguard of the tax-payer against the casual benevolence of a House wrought upon by the eloquence of a private member; against a scramble for public money among unscrupulous politicians bidding against one another for the favour of a democracy. But the rule is not law. Like all other resolutions or standing

[1] May, Parliamentary Practice (ed. 12), p. 446.

orders of either House it is a self-imposed rule made by a public body for the guidance of its procedure. It could be altered almost as easily as a College by-law, quite as easily as a rule of the Marylebone Cricket Club. Yet some of the most valuable parts of our constitution are to be found either in practices which depend upon simple usage, or upon rules as insecure as the standing order just described.

Grants of supply must originate in Committee of whole House.

The third rule to note respecting money bills is, that by a Standing Order of the House agreed to on the 29th March, 1707, 'the House will not proceed upon any petition, motion or bill, for granting any money, or for releasing or compounding any sum of money owing to the Crown, but in a Committee of the whole House.' Here we come to the actual process by which the House grants supplies to the Crown.

§ 2. *Committees of Supply and of Ways and Means.*

The practice of setting up a Committee of the whole House to consider supply dates from the reign of James I. The separate Committee to consider Ways and Means for raising the supply first appears in the journals during the Long Parliament [1], and became the regular practice during the reign of Charles II. But we have here to consider how at the present day the House of Commons grants supplies to the Crown, how it indicates the sources whence those supplies are to be drawn, how it appropriates the supplies granted to the services for which the grant is made.

Committee of Supply.

The Speech from the throne always contains a demand from the Crown for supply, and as soon as the House of Commons has agreed upon an address in reply to the Speech, it has for many years passed two resolutions—one that on a certain day it will resolve itself into Committee of Supply; another that on a certain day it will resolve itself into Committee of Ways and Means.

Estimates of the expenditure of different departments are presented to the House in detail by the ministers

[1] Com. Journ. ii. 138.

responsible for those departments, and, on the day fixed, the House goes into Committee of Supply or postpones the sitting of that Committee until a later day.

Until 1882 the rule prevailed that on every occasion that Supply was an Order of the Day, and on the question being put that 'Mr. Speaker do now leave the Chair,' in order that the House might go into Committee, it was open to a member to move any amendment, however irrelevant to the votes in Supply which it was proposed to take. Long after the establishment of the rule that when a Bill was in Committee the Speaker should leave the Chair without question put, 'the fear of unduly limiting opportunities of debate, and the discussion of grievances [1]' kept up this rule in the case of Supply, with all the consequent uncertainty as to what might be the subject of debate on any day when Supply figured in the Orders or when the business of Supply would be reached. Grievances precede Supply.

The present rule, settled in 1882, is that whenever Supply comes on as an Order of the Day the Speaker should leave the Chair without question put, except on the occasions when the House first goes into Committee on each one of the four great groups of estimates—the Army, Navy, Air Force, and Civil Services. On those occasions an amendment may be moved, or question raised, relating to that group of estimates which the House is about to take into consideration on the motion that the Speaker do now leave the Chair. This is what is known as 'getting the Speaker out of the Chair' on the Army, Navy, Air Force, or Civil Service vote. Changes of 1882,

The practice as to taking the necessary votes in Supply is also now settled. of 1902.

As soon as the Committee of Supply has been set up, and estimates presented, Supply is the first Order of the Day on every Thursday, unless a Minister of the Crown move and the House thereupon order otherwise. Such a motion must be made at the commencement of public business, and decided without amendment or debate.

Twenty days are allowed for the consideration of the

[1] Report of Committee, 1861, vol. xi, p. 434.

estimates in Committee and on report, not counting any days when discussion has arisen on the question that the Speaker leave the Chair. Three days may be added by vote of the House to be decided without amendment or discussion.

If no such addition is made, the business of supply is brought to a close on the 5th of August, or in any case, on the last of the allotted days, at 10 o'clock. On the last day but one every vote not taken is put by the Chairman, and decided forthwith, and the resolutions embodying the votes are reported to the House. On the last day at 10 o'clock the report stage is in like manner brought to a close, and the way is cleared for the introduction of the Appropriation Bill in which these votes are included.

On each of these allotted days one or more votes are set down for discussion; the Opposition are consulted by the Government as to the items of expenditure on which they are most desirous of raising discussion: the minister responsible for the estimate in question explains his policy or replies to criticism, and if he does not get the estimates voted at the close of the debate, they are voted automatically, under the guillotine, on the last allotted day[1].

Procedure of Committee.

At the end of every sitting the Committee resolves 'to report progress and ask leave to sit again.' If the Committee were closed it could only be reopened on a fresh demand of Supply from the Crown, either by royal message or in a speech from the Throne.

The Speaker then resumes the Chair, and the Chairman of Committees reports (1) the resolutions to which the Committee have agreed, and the progress made; (2) that the Committee ask leave to sit again. The House then orders the reports to be received on a day named; and that the Committee sit again.

When the resolutions are reported, the House is asked to agree with the Committee in their resolutions. It is not possible to increase the amount or alter the destination of the sums proposed to be granted either in the Committee stage or the Report stage of Supply: and at the end of the

[1] Standing Order, 15. (April, 1902.)

Session the resolutions are embodied in the Appropriation Act, to which we shall presently come.

Bills involving charges

So also, where a bill in the nature of general legislation creates or involves a public charge, a resolution authorizing the charge, passed in Committee of the whole House and agreed to on report, is necessary before the Bill is considered in committee. This financial resolution is moved by a Minister after the second reading of the bill [1], and the Department responsible for the bill circulates beforehand among members of the House a printed memorandum containing an explanation of the financial proposals which are to be discussed and an estimate of the amount of the charge. No amendment can be moved thereafter in committee on the bill which would have the effect of increasing the charge authorized by the financial resolution; if such an amendment becomes necessary, a further financial resolution must be passed, and the bill re-committed [2].

Votes of credit.

In times of emergency, such as war actual or threatened, recourse may be had to a Vote of Credit. In such a case the Crown asks for a grant of money in general terms, it being impossible at the moment to furnish (as in an ordinary Estimate) a detailed statement of the manner in which it will be spent; and Parliament, by acceding to the request, in effect places the money at the disposal of the Executive to be spent at the discretion of the latter on any object within the terms of the Vote [3].

Extent of financial control by Commons.

It may be asked how far, in the time allotted, the House can control, by examination, discussion, and possible reduction, the grant of supply asked for by a minister.

The answer must be that here, as elsewhere, theory and practice are not in accord. It is impossible for the House to discuss the innumerable items of our vast annual

[1] A bill may, however, be brought in immediately *after* a money resolution, if its scope is strictly limited to, and comprised in, the terms of the resolution, and in such a case notice of the resolution is a sufficient notice of the intention to introduce the bill (see p. 270).

[2] Bills involving charges upon rates only and not upon the Exchequer are outside these rules; but a Select Committee has recommended the adoption of a somewhat similar procedure in the case of these bills also, for the purpose of affording protection to the ratepayer: H. of C. (1920), 257.

[3] See Durell, Parliamentary Grants, pp. 57–71.

expenditure, and the successive days allotted to supply are occupied in the exposition and criticism of the policy of the departments whose estimates come up for consideration. Close criticism of the proposed outlay is the work of the Treasury before the estimates are submitted to the House. Supervision of expenditure, to ensure that the money voted is expended on the purposes for which it has been voted, is the work of the Comptroller and Auditor General and the Committee of Public Accounts. But the House of Commons, although in possession of the figures, has no time, nor even opportunity, for detailed criticism of the items of account. 'Under these conditions', said the Select Committee on National Expenditure in 1918[1], 'it is not surprising that there has not been a single instance in the last twenty-five years when the House of Commons, by its own direct action, has reduced on financial grounds any estimate submitted to it.'

The Committee on Estimates.

The Select Committee recommended the appointment of a Committee on Estimates[2], and in 1921 such a Committee was set up 'to examine such of the Estimates presented to this House as may seem fit to the Committee, and to suggest the form in which the Estimates shall be presented and to report what, if any, economies consistent with the policy implied in those Estimates may be effected therein.' Questions of policy, it will be noticed, are outside the Committee's jurisdiction, for these are matters for which the Government of the day, subject to the approval of the House as a whole, must assume responsibility. Yet it is a trite observation that policy regulates expenditure, and the scope of the Committee's inquiries is therefore necessarily limited. Nor is there any independent public officer who stands (or indeed who could stand) in the same relation to them as the Comptroller and Auditor General does to the Public Accounts Committee, and who could place at their service the same expert knowledge and criticism of departmental administration. Yet, notwithstanding these disadvantages,

[1] Ninth Report of the Committee; 1918 (H. of C.) 121. This Report deals with the financial procedure of the House and deserves careful study.

[2] Such a Committee had been appointed in 1912, 1913, and 1914, but its functions had lapsed on the outbreak of the war.

none can doubt that a wide field exists in which an Estimates Committee will be able to accomplish valuable and fruitful work [1].

§ 3. *Committee of Ways and Means.*

Committee of Ways and Means.

The Committee of Supply has determined what money shall be granted to the Crown and for what purposes. The next matter for consideration is—Where is the money to come from?

A great part of the revenue of the country arising from taxation is levied under Statutes which are permanent until Parliament otherwise determine, and the proceeds of all taxation are paid into the account of the Consolidated Fund, which is the Government account at the Bank of England.

But some taxation is annually imposed [2], and all taxation is liable to annual revision. Taxes may be remitted, or increased, or new taxes imposed, if the national revenue exceeds or falls short of the requirements of Government presented to the House in Committee of Supply.

In any case the sums standing to the credit of the Government in the Consolidated Fund cannot be drawn upon without Parliamentary sanction.

Its duties.

It is the business of the Committee of Ways and Means to frame resolutions: (1) for the employment of this Fund to meet the needs of Supply; (2) for its replenishment when necessary by the imposition of taxation.

It is in the discharge of the latter duty that the Committee receives from the Chancellor of the Exchequer a financial statement of the year in his Budget speech, and having been informed how far the expenditure of the year is balanced by the proceeds of the permanent taxes paid into the Consolidated Fund, and what remission or increase of taxation is proper for the coming year, passes the resolutions on which the Finance Bill for the year is based.

[1] For a discussion of the difficulties in the way of effective action by an Estimates Committee forbidden to trench upon questions of policy, see Durell, Parliamentary Grants, pp. 140–54, and the debates in the House of Commons of 22nd and 28th June, 1921: 143 Parl. Deb. 1496, 2085.

[2] The income-tax and the tea duty (representing direct and indirect taxation respectively) are voted afresh each year.

The work of the Committee of Ways and Means is therefore twofold—to submit resolutions for grants from the Consolidated Fund to meet the needs of Supply, and for the adjustment of income to expenditure by dealing with the taxation of the coming year. Its procedure is similar to that of the Committee of Supply, and its resolutions —reported to the House at the conclusion of each sitting— reach their final result in two bills, an Appropriation Bill, which legalizes the employment of the Consolidated Fund to meet the needs of Supply, and a Finance Bill, which embodies the fresh taxation, or freshly adjusted taxation, of the year.

Provisional Collection of Taxes Act, 1913.

It is usual for any resolutions of the Committee of Ways and Means agreeing to the renewal of old or the imposition of new taxes to be passed on the day on which the Chancellor of the Exchequer makes his annual budget statement to the Committee ; and it had long been the practice to treat them as having the force of law and to begin forthwith the collection of the taxes to which they referred. This practice was convenient to the Exchequer, and not inconvenient to the taxpayer ; but its legality was challenged in the case of *Bowles* v. *Bank of England*[1], in which the Court held that no resolution of the House of Commons renewing the income-tax[2] had any legal effect until embodied in the Finance Act of the year. To meet this difficulty the Provisional Collection of Taxes Act, 1913,[3] was passed, which gives statutory force for a limited period to any resolution of the Committee of Ways and Means varying an existing tax, or renewing for a further period a tax enforced or imposed during the previous financial year whether at the same or at a different rate, if it is declared by the resolution itself that in the public interest it is expedient that it should have this effect. The resolution must be agreed to by the House on report within ten sitting days, and the bill confirming it read a second time within twenty sitting days and finally become law

[1] [1913], 1 Ch. 57.

[2] Different considerations may possibly still apply to a resolution imposing or renewing a customs duty, by reason of the language of s. 18 of the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36) ; see also *Bowles' Case*, *supra*, at pp. 73, 79, and 91.

[3] 3 Geo. 5, c. 3.

within four months, from the date of the resolution. The Act only applies to duties of customs and excise and to income tax.

Origin of Committee of Ways and Means.

The Committee of Ways and Means is a curious survival. It takes its origin from the time when the Commons first began to appropriate their grant of supply to the particular services for which they desired to provide. This was done by assigning the proceeds of a given tax to a given service, and when the House had voted a sum in Supply it would naturally pass on to consider whether existing taxes were available to provide the sum needed, or whether a new tax must be imposed and assigned to the service in question.

At the present day all Supply is met out of the Consolidated Fund, and taxation is imposed, not to meet the wants of an individual service, but on a survey of the whole financial position.

Its present-day utility doubtful.

A Standing Order of the House now allows a resolution authorizing the issue of money out of the Consolidated Fund reported from the Committee of Ways and Means to be considered forthwith and the report stage and the third reading of a bill based upon the resolutions of the Committee to be taken forthwith as soon as it is reported from Committee of the whole House [1]. This is an improvement of the former practice which required the successive stages of a money bill to be taken on different days; but the interposition of the Committee and Report stage for Ways and Means between the Committee and Report on Supply and the subsequent bill still seems a needless expenditure of Parliamentary time [2].

§ 4. *Appropriation Bill.*

No public money paid without authority of Parliament:

In speaking of the Appropriation Bill it is not necessary to recapitulate what has been said elsewhere as to the Treasury, Exchequer, and Audit Departments, and the various machinery by which it is secured that the intentions of Parliament as to the disposition of public money are carried out. It is enough to say that none of the public money, that is, of the money constituting the revenue of

[1] Standing Order 71 B (February, 1919).

[2] See on this subject Hilton Young, National Finance, pp. 77–8.

the Crown, is paid except by Parliamentary authority, and that a great part of the revenue of each year is appropriated to specific purposes in an Appropriation Act passed in that year.

some payments need annual authority;

For just as some taxation is annually renewed while some does not require to be so renewed, so some payments are annual grants, while some do not require to be annually sanctioned [1]. Thus the payments of interest on the National Debt, and of various salaries and pensions, are charged by Statutes on the Consolidated Fund; they do not need to reappear annually in the estimates and run the gauntlet of the Committee of Supply.

some do not.

The sums voted to meet the Army, Navy, Air Force, and Civil Service estimates cannot be legally paid until they are embodied in the Appropriation Act; and the House of Commons, in order to get the supplies of the whole year into one bill, reserves the Appropriation Bill until the close of the session.

Financial business before 31st of March.

But the financial year ends at midnight on the 31st of March, and the authority given by the Appropriation Act of the preceding year for the issue of money stops then. Yet money will be wanted for the public service between the 1st of April and the passing of the Appropriation Act some four months later, and a good deal of financial business has to be done between the meeting of Parliament and the end of March.

Such business has generally two purposes. There may have been miscalculation in the estimates of the preceding year, and some departments may want more than was granted in the Appropriation Act. Supplementary estimates are then presented, passed in Committee of Supply, provided for in Committee of Ways and Means, and embodied in a Consolidated Fund Bill [2].

Supplementary estimates.

This only provides for the services until the 31st of March. The Army, Navy, Air Force, and Civil Services must have the

[1] For a fuller account of the distinction between Consolidated Fund Services and Supply Services, see vol. ii, Part ii.

[2] A department may have actually spent more than was granted. Then an *excess vote* is needed, and is passed on report from the Public Accounts Committee.

means of subsistence until the Appropriation Act is passed. These branches of the service admit of different modes of provision. A vote of money for one branch of army or navy service when embodied in a Consolidated Fund Act may be used for any other branch of that service; but each department of the Civil Service needs to be separately provided for. Money granted for the use of the Ministry of Agriculture cannot be employed for elementary education or to meet the needs of the Foreign Office. So it is usual to get some votes in Supply for Army, Navy, and Air Force, and a vote on account for all the branches of the Civil Service, to pass them through the Committee of Ways and Means [1] and embody them in a Bill which, like the Appropriation Bill of which it is an anticipation, is read a first and second time; passes through Committee and is read a third time; goes to the Lords and then passes through the same stages, but with greater rapidity, and receives the royal assent in sufficient time to enable the necessary issue to be made before the close of the financial year [2].

Vote on account.

When an Appropriation Bill or Consolidated Fund Bill has received the assent of the Lords it is returned to the Commons, and when the royal assent is about to be given to this and other Bills and the Commons are summoned to the House of Lords for that purpose, the Bill which grants money to the service of the Crown is brought by the Speaker to the Bar of the House of Lords, and handed by him to the Clerk of the Parliament to receive the assent of the Crown. This we may take to represent the fulfilment of the promise made by Henry IV that the grant made by the Commons and agreed to by the Lords should be reported to the King, 'par bouche de Purparlour de la dite Commune.'

Consolidated Fund Bill.

A bill for granting money to the Crown, whether by the

[1] Votes in Supply are earmarked to particular services or branches of services, but a vote in Ways and Means is only described as 'towards making good the supply granted,' &c. If votes for the Navy and Civil Service have passed through this stage of Ways and Means as well as Supply, the money can be used for the Army, so long as a vote for army services has been obtained in Committee of Supply before the Consolidated Fund Bill becomes law.

[2] Usually about two days before March 31st.

Form of Finance Bill,

imposition of taxes, or by the appropriation to supply of money out of the Consolidated Fund, is differently expressed to other bills in its enacting clause.

Act for granting duties of Customs and Inland Revenue.

Most Gracious Sovereign,

We, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom of Great Britain and Ireland, in Parliament assembled, towards raising the necessary supplies to defray Your Majesty's public expenses, and making an addition to the public revenue, have freely and voluntarily resolved to give and grant unto Your Majesty the several duties hereinafter mentioned, and do therefore most humbly beseech Your Majesty that it may be enacted; and be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows.

of Appropriation Bill.

An Appropriation or Consolidated Fund Act is in the same form with some necessary variations.

Appropriation Act.

Most Gracious Sovereign,

We, Your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom of Great Britain and Ireland, in Parliament assembled, *towards making good the supply* which we have cheerfully granted to Your Majesty in this Session of Parliament, have resolved to grant unto Your Majesty the sum hereinafter mentioned; and do therefore most humbly beseech Your Majesty that it may be enacted; and be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows.[1]

[1] A critic who speaks with authority has questioned the utility since the Parliament Act of formally confirming financial resolutions of the House of Commons (other than those imposing or renewing a tax) by an Act of Parliament, since these have now, in substance if not in theory, the force of law: Hilton Young, National Finance, pp. 80–1. But there are manifest advantages in the statutory form, and it seems doubtful whether the saving of Parliamentary time would compensate for the violent breach with tradition involved in its abandonment.

Section IV

The Procedure in the House of Lords and the Relations of the Houses

§ 1. *A Bill in the Lords.*

We will now resume the history of a bill at the point at which it is sent up to the House of Lords with a message that the Commons desire their concurrence. The bill is read a first time as soon as brought up: it then remains on the table of the House of Lords, and if twelve days pass while the House is sitting, and no notice is given of the second reading of the bill, it ceases to appear on the minutes and is dropped for the Session, unless before August 1st eight sitting days' notice of the second reading is subsequently given[1]. But if the bill is taken up by a member of the House, the procedure follows the lines of the procedure in the House of Commons. Debate can be raised at some stages of a bill at which it can no longer be raised in the House of Commons. The Lords have not the same reason to fear prolixity of discussion. The bill may be accepted by the Lords without amendment, and then after the third reading it is not returned to the Commons, but a message is sent that the Lords have agreed to the said bill without any amendment. If, however, the Lords amend the bill they return it after the third reading with a message that they agree to the bill with amendments to which they desire the concurrence of the Commons, and endorsed with the words, *A ceste bille avesque des amendemens les seigneurs sont assentus.*

Procedure in the Lords.

The Commons may agree or disagree with the Lords' amendments to their bill; whether they agree or disagree the bill is returned with a message to that effect; but if they agree the bill is endorsed with the words *A ces amendemens les Communes sont assentus.* Should there be disagreement and neither House be willing to accept the bill in the form which is satisfactory to the other, there are two modes by which the reasons of difference may be stated so as to bring about an agreement. One of these is a Conference, the

Disagreement between the Houses.

[1] Standing Orders, XXXVIII.

other is a statement of reasons drawn up by a Committee of the dissentient House and sent to the other with the amended bill.

A Conference.

A Conference is a formal meeting of members appointed by their respective Houses; these members are called Managers. The Managers on behalf of the dissentient House are entrusted with the drafting of reasons for their disagreement, and with the task of reading and delivering them to the Managers of the other House. No argument is used or comment made unless the conference be a free conference, in which case each set of Managers endeavours by persuasion to convince the others or in some way to effect an agreement between the Houses.

A free conference.

Reasons assigned in lieu of conference.

The ceremony of a conference is extremely formal: the Lords sit; the Commons stand: the Commons are bareheaded; the Lords, except when speaking, are only required to take off their hats as they approach and leave their seats.

Conferences are not in practice resorted to at the present time. No free conference has been held since 1836, and in 1851 the Houses by resolutions agreed to receive reasons for disagreement, or for insistence on amendments, in the form of messages, unless a conference should be specially demanded by one or other House.

Until 1855 it was customary that messages from the Lords should be conveyed to the Commons by Masters in Chancery, or, on special occasions, by Judges. Messages from the Commons were conveyed to the Lords by the Chairman of the Committees of Ways and Means, or the member in charge of the Bill with which the message was concerned. In 1855 it was agreed that one of the clerks of either House might be the bearer of such messages [1].

A message from one House to another is a formal statement of reasons drawn up by a Committee of the House which sends the message. Messages may go to and fro if the Houses cannot immediately come to terms, but the practical discussion takes place between the party leaders, and the settlement is reached, if at all, at informal con-

[1] May, Parl. Pract. (ed. 12), pp. 531–2; Standing Orders (H. of C.), 93.

ferences, the results of which are subsequently embodied in a message.

§ 2. *The Houses in Conflict, and the Parliament Act.*

Ordinary procedure.

So far we have considered the ordinary procedure where a difference has arisen between the two Houses. Conference and message are alike formal transactions; informal discussion between party leaders in the two Houses is the practical mode of settling whether a Bill shall pass with amendments agreed to by both Houses, or whether it shall be dropped for the Session.

The Parliament Act.

We have now to consider the procedure provided by the Parliament Act of 1911. The Act deals with two classes of Bills: Money Bills and other Public Bills.

Money Bills.

(1) A Bill sent up to the House of Lords one month before the end of a Session, which the Speaker of the House of Commons certifies to be a Money Bill within the meaning of s. 1 (2) of the Act[1], if not passed without amendment within one month after it is sent up is presented for the Royal Assent and becomes law, though the House of Lords have not consented to the Bill.

Other Public Bills.

(2) A Public Bill which is not a Money Bill, nor a Bill to extend the duration of Parliament, and which is passed by the Commons in three successive Sessions, not necessarily of the same Parliament, and rejected by the Lords in each of these Sessions, becomes law without the assent of the Lords provided that two years have elapsed between the date of its second reading in the House of Commons in the first of the three Sessions and its passing that House in the third of those Sessions.

The part which the Speaker is required to perform in certifying that a Bill under ss. 1 is a Money Bill, and that a Bill under ss. 2 is the same Bill in the successive Sessions

[1] For the Parliament Act definition of a Money Bill, see p. 157. It is in some respects more limited than that which had in practice been adopted by the House of Commons when asserting its privileges against the Lords; and it may be noted as a curiosity that the Speaker in fact withheld his certificate from the Finance Bill of 1911, the first after the passing of the Parliament Act: 32 Parl. Deb., 5th Series, 2707. It has also been withheld in more than one subsequent year.

through which it passes, has already been described in an earlier chapter.

Results.

The House of Lords is now no longer co-ordinate in legislation with the House of Commons ; the Parliament Act transfers legislative sovereignty to the Commons, subject only to the Royal Assent.

Courses open to Ministers when Houses could not agree.

But the process by which the Parliament Act became law is also important as illustrating the methods by which the action of the House of Lords can be forced into harmony with that of the House of Commons. Before the Act, if the Lords rejected a Bill which had come up from the Commons, or declined to pass it without amendments to which the Commons could not agree, ministers responsible for the Bill had certain courses open to them.

Concession.

They might induce their followers in the Commons to accept the Lords' amendments ; or they might drop the Bill. They might resign office, in which case their successors, being presumably in a minority in the Commons, would be compelled to ask for a dissolution.

Dissolution.

They might, themselves, ask for a dissolution in the hope that the verdict of the country would be in favour of themselves and their measures, in which case the Lords would certainly give way.

Creation of peers.

They might by invoking the prerogative of the Crown for the creation of peers change the balance of power in the House of Lords.

Previous creation.

The last occasion on which peers were created to provide a Government with a majority is almost contemporary with the last occasion of the refusal of the Royal Assent to a Bill. Queen Anne used the prerogative of the veto in 1707 ; in 1712 she consented to create twelve peers in order to secure the assent of the Lords to the Treaty of Utrecht. Since then there have been two occasions when such a creation of peers has been seriously contemplated. The passing of the Reform Bill in 1832, of the Parliament Bill in 1911, was in each case procured by a statement that the King had consented to create peers in sufficient numbers to provide a Government majority in the House of Lords.

The employment of the prerogative to introduce a number

of persons into a legislative assembly, for the sole purpose of determining a vote on a particular occasion, would seem to be a use of legal power only to be justified in cases of extreme emergency. Character of this prerogative.

We must consider the conditions under which the exercise of this prerogative was placed at the service of Ministers in 1832 and in 1911. Its use in 1832 and 1911.

In 1831 and 1832 the Peers were not only acting in opposition to the House of Commons; they were also acting in opposition to the wishes of the electors, expressed clearly and emphatically at the general election of 1831. In April of that year the first Parliament of William IV was dissolved because, after the House of Commons had passed, by a majority of one, the Reform Bill introduced by Lord Grey's ministry, there were evident signs that the progress of the Bill would be embarrassed and its character altered in Committee. The general election of 1831 returned a House of Commons which passed the Reform Bill on its second reading by a majority not of 1 but of 136. The Bill went up to the House of Lords and was rejected by a majority of 41. It was then once more introduced into the House of Commons and on this occasion the second reading passed by a majority of 162. It went up to the Lords, was passed on second reading by a majority of 9, and was in obvious danger of being destroyed in Committee. Conditions of 1832.

There was no doubt as to the wishes of the country, nor was there any doubt that the House of Lords was prepared to disregard the wishes of the country. Under these circumstances the King consented to such a creation of peers (perhaps eighty in number) as would enable the Bill to be carried through the House of Lords. At the same time he averted the necessity for such a creation by addressing a private communication to the Tory peers which induced them to withdraw from further opposition to the Bill.

Between 1832 and 1911 many changes took place which incidentally, but in important respects, affected the relations of the two Houses.

Until the passing of the Reform Act 1832 the Peers, through the nomination boroughs, and by the exercise of

local influence, were able, to an appreciable extent, to determine the composition of the House of Commons.

This connexion between the two Houses was severed in 1832, and the electoral reforms of 1884 and 1885 widened the gulf which separates a Chamber whose members sit there by hereditary right from one whose members are often the nominees of a party organization, and are chosen on a democratic franchise.

Convention subsequent to 1832.

In the years which followed 1832 a convention came into existence to the effect that when the country had emphatically pronounced in favour of a measure, and when that measure had been formulated and passed in the House of Commons and sent up to the House of Lords, that House would acquiesce, although the measure was one of which the majority of the Peers might disapprove.

Irish Church Bill.

The convention is best exemplified by the attitude and language of Lord Cairns when in 1869 the Irish Church Bill came before the House of Lords :—

> 'There are questions which arise now and again—rarely but sometimes—as to which the country is so much on the alert, so nervously anxious, and so well acquainted with their details, that it steps in as it were, takes the matter out of the hands of the House of Lords and the House of Commons, and substantially tells both Houses of the Legislature what it requires ; and in those cases either House of Parliament or both together cannot expect to be more powerful than the country, or to do otherwise than the country desires.'

Debatable ground.

But this convention left open a large debatable ground, for the Peers might object to the form and order in which measures which they are ready to accept are presented to them ; they might question the certainty of the alleged expression of the opinion of the country, or the sufficiency of the consideration given to a measure in the House of Commons.

Sequence of measures. Franchise in 1884,

The first of these difficulties is illustrated by the events of 1884. In that year a Bill for a large extension of the franchise was carried through the House of Commons by great majorities, and there was no doubt that, at the preceding general election, the country had pronounced

decidedly in favour of the proposed extension. The measure involved a great change in the distribution of seats, but the Government proposed to postpone the legislation on this subject until the Franchise Bill had become law. The Lords said, with some show of reason, that before agreeing to a great increase in the electorate they were entitled to know how political power, so largely extended, would be distributed throughout the country.

and Redistribution.

They therefore declined to proceed with the Franchise Bill until the Redistribution Bill, which was to follow it, was placed in their hands. The dispute did not touch the merits of the Franchise Bill, it really concerned the time and order in which certain measures should be introduced. The issue was obscured, as happens in such cases, by misunderstandings and imputations of motive, but the result was a compromise. The scheme for a redistribution of seats was produced ; a Bill to give effect to it was settled in consultation by the leaders of the two parties ; the Lords thereupon passed the Franchise Bill and the dispute was at an end.

Claim of Lords to judge opinion of country.

But in 1906 Lord Lansdowne claimed that the duty of the Lords was ' to arrest the progress of measures whenever we believe that they have been insufficiently considered, and that they are not in accord with the deliberate judgment of the country '. A claim of this kind asserted by an hereditary Chamber was bound sooner or later to involve it in a crucial conflict with the popular House ; but it may be admitted that since 1885, and for several reasons, doubt might well exist whether a bill which had passed the House of Commons necessarily represented the deliberate judgement of the country.

Doubts arising from defects of representation,

The creation of single member constituencies by the legislation of 1885 and the growth and change in the population of the electoral areas has on occasion produced curious electoral results. The balance of parties in the House of Commons has frequently not corresponded with the balance of opinion in the country ; and the number of members returned to support a party policy has been often very disproportionate to the number of votes polled in favour of that party and its policy.

from confusion of issues,

To this it must be added that a general election often presents such a variety and confusion of issues as may well puzzle an electorate which depends for its information on the polemical utterances and literature of the occasion. The result may not signify the unhesitating pronouncement in favour of some or all or any of the measures which have been the topic of election speeches. The electorate may merely desire a change of men, or may be content with an existing Government. And a Government elected on one issue may take advantage of its majority to introduce legislation of which nothing was heard at the general election.

from dominance of groups.

The period between 1885 and 1911 also witnessed the development of groups in the House of Commons, which was no longer divided into two great political parties[1]. A group may be sufficiently numerous to determine the fate of Ministries; but it may also be irresponsible, in the sense that its leaders could not, even if they would, assume the responsibility of government. Their wishes may not be the wishes of the electorate, but their support may be necessary to the existence of a Government.

Hence it might come to pass that a measure which, if presented by itself for acceptance or rejection, would not find favour with the electors, might be pressed through the House of Commons under the influence of a group.

Consequent action of the Lords.

The House of Lords conceived it their duty to voice the doubts which had arisen as to the infallibility of the House of Commons in expressing the will of the people, and exercised very freely their powers of amendment and objection in the case of bills which were designed to affect large constitutional or social change.

In 1906, within a few months of a general election in which the Government had secured an unprecedented majority, they rejected, on the second reading, a bill to abolish plural voting, on the ground that the measure was only part of a scheme of electoral reform which should be presented to the country as a whole. They also amended,

[1] The coalition of parties since 1915 has introduced a novel factor into politics; but the situation thereby created may reasonably be regarded as temporary, or at most transitional.

in many of its most controversial features, an Education Bill which had occupied the House of Commons for many weeks. The Commons rejected the Lords' amendments in their entirety, and after some negotiations and ineffectual concessions the Bill dropped.

Commons' resolution of 1907.

As a result of this action of the Lords Sir Henry Campbell Bannerman, in 1907, moved a resolution, which was carried after three nights' debate, to the effect that the powers of the House of Lords to alter or reject bills passed by the Commons 'should be so restricted by law as to secure that within the limits of a single Parliament the final decision of the House of Commons should prevail.'

Rejection of Finance Bill, 1909.

In 1909 the House of Lords declined to pass the Finance Bill of the year on the ground that it embodied principles of taxation so novel in character as to need the express approval of the electors before passing into law. Parliament was at once dissolved. At the general election which took place in January, 1910, the Government lost more than 100 seats, and the two great parties were left almost on an equality of numbers; but the Government, supported by the votes of the Nationalist and Labour groups, could command a majority of 120.

The Parliament Bill, 1910.

The House of Lords accepted the verdict of the general election and passed the Finance Bill; but the Government immediately introduced resolutions, subsequently embodied in the Parliament Bill, with a view to the curtailment of the powers of the Second Chamber. These resolutions were carried in April, 1910, after a discussion which lasted for eleven days of Parliamentary time, and the Parliament Bill of 1910 was introduced and read a first time without discussion.

Conference of leaders.

A Conference of the party leaders which followed the death of King Edward VII in the same year failed to come to terms on the constitutional questions in issue and broke up in November. What followed we learn from the speech of the Prime Minister (Mr. Asquith) in the House of Commons on 7th August in the following year.

Events of November, 1910.

On the 15th November, 1910, the Cabinet advised the King to dissolve a Parliament which was not a year old,

and which never had the opportunity of discussing the Parliament Bill itself, though it had discussed very thoroughly the resolutions on which the Bill was founded. But at the same time they asked for a promise that

'in the event of their policy being approved by an adequate majority in the new House of Commons, His Majesty would be ready to exercise his constitutional power, which may involve the prerogative of creating peers, if needed to secure that effect shall be given to the decision of the country'

They further advised

'that no communication of the intention of the Crown should be made public unless and until the actual occasion should arise.'

The King's promise.

His Majesty, 'after careful consideration of the circumstances past and present, . . . felt that he had no alternative but to assent to the advice of the Cabinet.'

Conditions of 1911.

The general election gave to Ministers a majority dependent on the support of the Nationalist and Labour parties. The Parliament Bill passed the Commons. When it went up to the Lords amendments were introduced mainly directed to secure an appeal to the country before great legislative changes could be made on which the country had not deliberately pronounced.

The threat to create peers.

It was then that the Prime Minister, in a letter to the Leader of the Opposition, announced the intention of His Majesty to exercise the prerogative of creating peers in sufficient numbers to ensure the passing of the Bill without these amendments.

Its effect.

What followed is very recent and controversial history. In a crucial division a large number of peers abstained from voting for or insisting on the amendments introduced by the Lords, and a sufficient number voted against such insistence to ensure the passing of the Parliament Bill in the form desired by the Government. Thus for the second time, though under different conditions, the House of Lords has avoided, by submission, a threatened creation of peers; a creation on a scale which would have expanded the House to ludicrous proportions. Differences between the two Houses will not be settled, as heretofore, by compromise

or by an appeal to the people; the House of Commons can now, after an interval, carry its measures in the form it pleases.

Retrospect of events of 1909–11.

The time has perhaps not yet arrived for a wholly impartial estimate of the political events of 1909–11. But since the war much that had been obscured by the dust of party conflict can now be seen in a truer perspective.

Necessary consequences of rejection of Finance Bill.

The rejection of a Finance bill by the House of Lords necessarily brought to a final issue the conflict between the two Houses which had been steadily growing more acute. Nothing could thereafter be the same, and the conflict could only end in the complete defeat of one or the other.

The issue between the two Houses.

There had never been, it is true, any formal denial of the technical right of the Lords to reject a money bill; but in the year 1909, until the event actually occurred, it is scarcely too much to say that it would have been regarded as impossible. The Finance Bill of 1909 may have contained wholly novel schemes of taxation; criticism of its land taxes as unworkable may have proved in the event to have been justified [1]; it may have had objects not exclusively financial. But in 1909 it was an even greater novelty for the House of Lords to claim to be a more faithful interpreter of the popular will in matters of finance than the House of Commons; and it is obvious that the House which can reject a budget can also compel a dissolution and make and unmake Governments. The action of the Lords was, therefore, essentially a challenge not only to the Government of the day but to the authority of the Commons.

The settlement: contrast between 1832 and 1911.

In these circumstances, it was inevitable that the victorious party in the ensuing struggle should have insisted on imposing upon their adversaries a settlement which went beyond the immediate financial issue. Party passions had been aroused, political memories had been stirred, and compromise was no longer possible. The methods by which the settlement was effected are still matters of controversy into which it is outside the scope of this book to enter. It is sufficient to point out that Lord Grey advised William IV

[1] They were repealed by the Finance Act, 1920 (10 & 11 Geo. 5, c. 18), s. 57.

to exercise a discretionary prerogative when the moment for the exercise of discretion had arrived. Mr. Asquith advised His Majesty to promise the exercise of this power when a long interval of time must elapse and many intervening contingencies might arise before the power could be called into action. The advice so tendered may have been without precedent, but so also were the circumstances which gave rise to it ; and since the occasion for a similar exercise or threatened exercise of the prerogative can hardly recur, it will be more appropriate for the historian than for the constitutional lawyer to pronounce a final judgement.

The recommendations of the Second Chamber Conference.

The subject of the two Chambers in conflict has more recently been considered in a calmer atmosphere by Lord Bryce's Second Chamber Conference, to which reference has already been made.[1] The Conference were unanimous in recommending that no reformed Second Chamber should have power to amend or reject a financial bill. They recognized, however, that 'many large changes—indeed revolutionary changes—might be carried through by measures purported to be financial' and that 'if the new Chamber, elected as proposed, is to be of real service, its views ought to be heard regarding such changes.' The difficulty was to find a satisfactory definition of a purely financial bill, and the Conference confessed themselves unable to solve the problem. They suggested therefore that in all cases of doubt the question should be left to the final decision of a small joint committee of both Houses, but that in any event the Speaker should be relieved of the difficult task imposed on him in this respect by the Parliament Act.

A Free Conference.

With regard to the adjustment of differences between the two Houses in the case of ordinary legislation, they recommended that the old method of the Free Conference[2] should be revived, the Conference to consist of 20 members

[1] 1918, Cd. 9038 ; see *ante*, p. 250, where the views of the Conference as to the functions appropriate to a reformed Second Chamber are set out.

[2] *Ante*, p. 250.

of each House appointed at the beginning of each Parliament with 10 additional members of each House on the occasion of the reference of any particular bill. This Conference, deliberating in private, would consider any bill passed by one House and rejected by the other and endeavour to bring about an agreement. If an agreement were reached on the bill, whether in its original form or with amendments, then, if both Houses approved the suggested agreement, the bill would be presented for the Royal Assent. If, on the other hand, the bill, as reported by the Free Conference, were accepted by one House but rejected by the other, it would be referred back to the Conference in the following Session, and if the Conference then reported that it had accepted the bill in the same form by a majority of not less than three of those present and voting, the bill, if approved by both Houses or by the House of Commons alone, would be presented for the Royal Assent. If the Conference failed to pass the bill again in the same form or passed it by a majority of less than three, the bill would lapse unless both Houses accepted it as reported.

ence between the Houses suggested.

These recommendations are, of course, bound up with the whole question of the reform of the Second Chamber, and the time has not yet come for a critical examination of them.

Section V

PRIVATE BILL LEGISLATION

§ 1. *Historical outline.*

The passing of a private bill is, at the present time, a proceeding partly legislative, partly judicial. Such a bill commences by petition; it is furthered by persons outside the House, the promoters, who have some practical interest in the passing of the bill: it relates to matters of individual, local, or corporate interest. Although it passes through the forms of a public bill, and although these forms are a vital part of its progress, yet the most interesting and important stage of that progress is its passage through Committee, which is for the purpose of private bill legislation a select Committee of one or other House. This Committee

A private bill is partly a judicial proceeding.

acts as a judicial tribunal before whom counsel appear on behalf of the promoters or the opponents of the bill in question.

Originally the petition of an individual.

The history of private bill legislation might lead us to a great deal of very interesting inquiry concerning Parliamentary antiquities[1], but with these it is only possible to deal in the most general way. The petition with which the bill commences was the only method in the Middle Ages for obtaining rights or the enforcement of rights which the Common Law Courts could not confer or assure. If a man had to complain of inequitable dealings in the matter of property or contract, he petitioned the Crown or the Crown in Chancery. If he had to complain of violence or oppression, such as the ordinary Courts could not or dared not redress, he petitioned the Crown in Council. If he was not in search of equity or of law, but wanted to get the law altered in his favour, he petitioned Parliament, sometimes addressing himself to King, Lords, and Commons, sometimes to Lords and Commons, sometimes to the Commons alone, sometimes to the King or to the King in Council.

Addressed to Parliament.

The petitions from which private bill legislation takes its origin are those which it became the practice in the reign of Henry IV to address to Parliament, or to the Lords or the Commons[2]. Such petitions were not handed, as in earlier procedure, to the Receivers and Triers of Petitions nominated (as they were nominated until 1886) at the commencement of each Parliament. They went to the House to which they were addressed, generally the Commons, and after consideration there, were passed on with the endorsement, '*soit baillé aux seigneurs*.' Such petitions were at first of a purely personal character, attainders or the reversal of attainders, rewards given or punishments inflicted in individual cases. Later comes local legislation, the regulation of fisheries, of the navigation of rivers, of harbours, the prevention of floods, and

Cease in time to be wholly personal.

[1] The learning of this subject is made extremely interesting in Mr. Clifford's work on Private Bill Legislation, where the historical side of the question is amply treated.

[2] Stubbs, Const. Hist. iii. (5th ed.) 478, and n. 1.

the inclosure of commons. Last comes legislation on behalf of bodies incorporated for commercial purposes, requiring, in furtherance of those purposes, some interference with private rights. Such are the acts passed to confer powers on railway, gas, and tramway companies, of which every session affords numerous examples.

'Private' and 'Local' Acts.

The first of these three groups is at the present time distinguished from the rest by the title of 'Private Act,' and relates to such subjects as naturalization, dealings with trust estates, divorce (where, as in the case of persons domiciled in Ireland, there is no Court with jurisdiction to dissolve the marriage); even bills for the reversal of an attainder are not extinct[1]. The last two are included under the general term 'Local Acts,' and cover almost the whole ground of private bill legislation.

§ 2. *Procedure in respect of private bills.*

Technicality of procedure.

It would be impossible without entering into technicalities and details unsuited to the compass and character of this book, to attempt to do more than give a very general outline of the process of private bill legislation. Enough may be said, however, to show the nature of these half legislative, half judicial proceedings, and the care with which the Houses guard themselves against legislating in the interest of private persons or of corporations to the detriment of individual interests, unless they are satisfied that public purposes are to be attained for which individual interests may fairly be set aside with compensation for loss sustained.

Petition.

By the 21st of December, in the year before the bill is to be brought forward, due notice having been given by advertisement and otherwise to all bodies and persons whose interests are likely to be affected by the proposals contained in it, a petition for the bill must be deposited in the Private Bill Office of the House of Commons, together with a copy of the bill and certain explanatory documents required by the Standing Orders of the House[2].

[1] Alexander's Restitution Bill, 1916.

[2] The procedure of the Lords in respect of Private Bills differs in points too technical to be dealt with in a sketch of the subject.

Memorial from opponents.

Here too are sent memorials from parties interested in preventing the passing of the bill, to the effect that the Standing Orders of the House have not been complied with in the presentation of petition, bill, and documents.

Inquiry as to compliance with Standing Orders.

On the 18th of January the petitions and memorials are dealt with by two Examiners, one appointed by the House of Lords, the other by the Speaker. If no one appears in support of a petition, it is struck out, but in the ordinary course the agent concerned in promoting the bill offers proof that the Standing Orders have been satisfied; those who have presented memorials against the bill are heard, not on the merits of the bill, but on the preliminary question of compliance with the Standing Orders; witnesses are called; and at the conclusion of the hearing the petition is endorced by the examiner and returned to the Private Bill Office. If the endorsement is to the effect that the Standing Orders have been complied with, no more is said; but if the examiner decides adversely to the petition on this point, he makes a report to the House of Commons, and sends a certificate to the House of Lords to indicate the non-compliance.

Want of compliance may be condoned by House.

But the preliminaries are not yet over, nor is the bill lost because the examiner has found that the Standing Orders have not been complied with. The petition is in any case presented to the House of Commons by a member three days after endorsement; if reported against by the examiner it is referred to the Standing Orders Committee, consisting of eleven members of the House, who consider whether the Standing Orders may be dispensed with, and even if the Committee report adversely to the bill their report may be overruled by the House.

So far the rules of the House are careful to provide that all persons interested in the proposed bill may have full notice by advertisement, and full information by access to documents of the intention and nature of the proposed bill.

First reading.

The bill is read a first time, and is then, upon notice given of the second reading, referred back to the Private Bill Office for examination, lest the form in which it is drawn

should violate the Standing Orders, or depart from the terms in which leave was given for its introduction.

Second reading.

It is then read a second time, and here if at all the general principle of the bill is discussed in the House: but the effect of a second reading is not, as in the case of a public bill, to affirm the principle of the bill, it merely indicates that the bill contains no obviously objectionable features.

Reference to Committee.

When read a second time, the bill is committed, and then goes to a Committee of Selection which arranges the bills and assigns them to committees consisting of four members and a referee.

Renewed inquiries as to form.

But further precautions are taken before the Committee deals with the bill. The Chairman of Ways and Means for the Commons and the Chairman of Committees for the House of Lords examine all bills before they are passed into Committee. They may report any special circumstances in connexion with the bill either to the House or to the Chairman of the Committee, or may recommend that a bill to which no opposition has been offered should be treated as opposed.

The bill in Committee.

The Committee stage is the really interesting and exciting part of the career of a private bill, for there the judicial aspect of the House in its dealings with these measures is brought into strong light: and it appears in a judicial character not as in the preliminary stages of the bill to ensure compliance with forms of procedure, but to hear a keen and animated contest upon the merits of the bill conducted by counsel for the promoters and opponents, and supported by witnesses examined upon oath.

Requirement of *locus standi* in opponents.

But the opponents of a bill have to go through various formalities before they are permitted to appear in that capacity. The opponent of a bill must first deposit a petition at the Private Bill Office within ten days after the first reading. He must then be prepared to meet objections raised by the promoters of the bill to his right to be heard, and such objections are raised and argued before a court of referees, consisting of the Chairman and Deputy Chairman of Ways and Means with seven members appointed by the Speaker, to determine the *locus standi* of petitioners against a bill. Questions of *locus standi* are argued by counsel before

this court, and the right of an opponent to be heard in Committee against the whole or against any clauses of the Bill is there settled [1].

Judicial character of proceedings in Committee.

This is the process by which the right of opposing a bill or any part of a bill is ascertained and limited; when this is settled the Committee sits to hear the parties; counsel then appear for the promoters of the bill and for the petitioners against it, witnesses are examined, and the whole proceeding is of a judicial character, though conducted before a tribunal not perhaps very familiar with judicial functions. The various Government departments who are concerned with matters dealt with in the bill also make reports and recommendations to the Committee either on the bill as a whole or on particular proposals in it.

If the preamble of the bill is proved to the satisfaction of the Committee, the clauses are taken in order; if the preamble is rejected, the bill falls to the ground. When the Committee has been through the bill it is reported to the House, and its subsequent stages are similar to those of a public bill except in the form, to be described presently, in which it receives the Royal assent.

Scottish private bill procedure.

Scottish private bills are dealt with under a different procedure prescribed by the Private Legislation Procedure (Scotland) Act, 1899 [2]. Under this Act the promoters present a petition to the Secretary for Scotland, praying him to issue a provisional order [3] in accordance with the terms of a draft order submitted to him. The draft order is then considered by the Chairman of Committees in the House of Lords and the Chairman of Ways and Means in the House of Commons, who report whether in their opinion the case is one to which the procedure of the Act may properly be applied, or whether the ordinary private bill procedure will be more appropriate. If the former, the petition is considered by the Secretary for Scotland, and, if it is opposed or if for

[1] The Lords have no Court of referees, and these questions are heard by the Committee on the Bill.

[2] 62 & 63 Vict. c. 47.

[3] Provisional orders under this Act must not be confused with the provisional orders which the Secretary of Scotland, like the heads of certain other departments, is authorized to issue under other Acts for particular purposes: see *post*, p. 316.

any other reason he thinks it desirable, he directs an inquiry to be held by Commissioners sitting in Scotland. These Commissioners are appointed from panels formed in the one case of members of the two Houses of Parliament and in the other of persons 'qualified by experience of affairs to act as Commissioners,' and the inquiry which takes place before them follows the lines of proceedings before a Private Bill Committee in Parliament. They report to the Secretary for Scotland, who, if the report is favourable, proceeds to issue a provisional order. A bill to confirm the order is then introduced into Parliament, and, subject to certain special rules of procedure, becomes law in the ordinary way.[1]

Much might be added as to the process of classification of private bills, and the details of procedure in respect of them. But since these are not matters of constitutional importance, and can easily be found in books of Parliamentary practice or in the published Standing Orders, it is not necessary to carry the subject further.

As the ordinary course of Legislation depends almost entirely upon the rules which each House adopts for the regulation of its procedure, it is well to note that these fall into three classes.

Rules governing process of Legislation.

There are *standing orders*, resolutions as to procedure, which each House intends to be permanent, and these, though they may at any time be repealed or suspended by resolution, endure from one Parliament to another in default of such repeal or suspension.

There are *sessional orders*, rules which last only for the session, and are renewed at the commencement of each session.

There are *indeterminate orders* and resolutions. Such are resolutions declaratory of practice and usage which expire with the session in which the resolutions were passed. These are not, technically, standing orders, though they are observed from session to session, and are regarded as regulations operating in the same way as a standing order.

[1] Private bills relating to Northern Ireland are now dealt with by the Northern Ireland Parliament.

Section VI

Provisional and other Statutory Orders and Rules.

The subject of the Process of Legislation cannot be concluded without noticing the delegation of legislative powers to government departments; an important, and an increasing practice. Such legislative powers are sometimes exercisable without further reference to Parliament, sometimes their exercise is more or less subject to Parliamentary supervision.

Provisional Orders.

Provisional Orders are, of these forms of departmental legislation, the nearest akin to private bills. They are made by a government department acting under statutory powers, and their object is to give effect to schemes or proposals of local bodies and companies, subject in the first instance to the approval of the department, and finally of Parliament.

These orders are arranged in groups by the department from which they proceed, and thus grouped are placed in schedules to Bills which come before the Houses of Parliament for confirmation. On the first reading of such bills they are referred to the examiners, mentioned in the previous section, to ensure that the Standing Orders are complied with. If opposition is offered to any Order, the confirming Bill is referred to a select committee and thereupon the opposed Order is treated as an ordinary private Bill.

Illustrations of the subject of such procedure are Orders conferring powers to make piers, harbours, tramways, to employ electric lighting, to create local government or sanitary districts, to extend the boundaries of a borough.

The Provisional Order, being to all intents a form of private bill legislation, has no force whatever until the confirming bill wherein it is scheduled passes both Houses of Parliament and receives the royal assent.

Provisional Order Bill.

Briefly it may be said of Provisional Orders that they are made by a government department in pursuance of a statute; that they are then scheduled in a Bill which goes through all the stages necessary to turn a Bill into an Act; but that unless objection is specifically raised they are

usually not discussed, but are accepted by the House on the authority of the department from which they emanate.

The following form exhibits the character of a Provisional Order and the Bill which confirms it :—

A Bill

to confirm certain Provisional Orders of the Minister of Health relating to Bournemouth, Gravesend, Margate and Rotherham (Rural).

Whereas the Minister of Health has made the Provisional Orders set forth in the schedule hereto, under the provisions of the Public Health Act, 1875. And whereas it is requisite that the said Orders should be confirmed by Parliament :

Be it therefore enacted by the King's most excellent Majesty, by and with the advice of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows :—

1. The Orders set out in the schedule hereto shall be and the same are hereby confirmed, and all the provisions thereof shall have full validity and force.

2. This Act may be cited as the Ministry of Health Provisional Orders Confirmation (No. 9) Act, 1921.

Orders and regulations made under statutory powers. Their character

Other orders, rules and regulations are made every year which do not go through the form of provisional orders. They are very numerous and often relate to important matters.

They vary in character.

Some are in the nature of administrative or executive acts, such as orders by the Minister of Agriculture touching the importation of cattle or the muzzling of dogs, or by the Privy Council uniting two or more Ecclesiastical benefices, or by the Board of Trade altering the scale of charges of gas undertakings. Some are in the nature of subordinate legislation and are of a public and general character, such as the rules regulating procedure of the Courts made by the Rule Committee under the Judicature Acts, or by the Minister of Health under the National Health Insurance Acts.

and mode of enactment.

They vary also in the procedure necessary to give them force.

Some are made by the department concerned under

powers conferred upon it by Parliament, but without further reference to Parliament, such as the poor law orders regulating the duties of Guardians made by the Minister of Health under the Poor Law Amendment Act, 1834, and subsequent statutes. These have statutory force as soon as they are issued. Some come into force as soon as they are made, but must be laid before Parliament forthwith. In the case of others, it is provided that either House of Parliament may within a certain number of days present an address to the Crown praying that they may be annulled; and more recently the practice has grown up, owing to the jealousy with which Parliament regards the activities of the departments in the matter of delegated legislation, of requiring a draft of the proposed order or regulations to be approved by both Houses before the order or regulations are finally made. Examples of this latter procedure may be found in the case of certain orders made under the Census Act, 1920[1], or under the Ministry of Health Act, 1919[2], transferring any powers or duties of the Minister of Health to another department.

Reasons for increase of delegated legislation.

The difficulty of carrying a complicated measure of legislation through the House of Commons is responsible for the tendency to leave matters of detail to be formulated by rules or regulations made in the department which is concerned with the administration of the statute in question. The power of the executive necessarily grows as the intervention of the State in the concerns of daily life outgrows the capacity of Parliament to discuss and determine these matters within the limits of Parliamentary time. Much ill-informed criticism has been directed against the departments in consequence; but they are in this matter no more than the agents of Parliament, carrying out the duties with which Parliament itself has entrusted them, and, if they go beyond their powers, they are always liable to have their regulations declared of no legal effect by the courts of law. Parliament can also at any time refuse to delegate a regulation-making power to the department called upon to administer a new statute, and can insist upon embodying

[1] 10 & 11 Geo. 5, c. 41. [2] 9 & 10 Geo. 5, c. 21, s. 8.

the necessary administrative details in the statute itself. This, however, is a counsel of perfection, and in the present state of Parliamentary business, impossible of attainment, even if it were desirable. Meanwhile, the indirect methods of Parliamentary control, above described, on the one hand, and the action of the courts on the other, would seem to afford reasonable safeguards against misdirected energy on the part of the departments [1].

Section VII

Ecclesiastical Measures.

Ecclesiastical Measures a special kind of delegated legislation.

Ecclesiastical Measures are a species of delegated legislation, but present such exceptional features that they require to be considered separately. They derive their legal validity from the Royal Assent but, though they cannot be presented for the Royal Assent save by the authority of Parliament, yet they are not the work of Parliament or of any Government department, but of a wholly independent body, the National Assembly of the Church of England.

Procedure of the National Assembly of the Church of England.

This Assembly, the constitution of which need not here be described, received statutory recognition by the Church of England Assembly (Powers) Act, 1919 [2], sometimes called the Enabling Act, because its object was to enable the Church of England to legislate on its own domestic matters, instead of being compelled to compete with the vast number of other claimants for Parliamentary time. The Act provides that Measures passed by the Assembly are to be submitted by its Legislative Committee to a committee of both Houses of Parliament styled the Ecclesiastical Committee, consisting of fifteen members of the House of Lords, nominated by the Lord Chancellor, and fifteen members of the House of Commons nominated by the Speaker. The Ecclesiastical Committee, after considering the measure, prepare a draft report upon it to Parliament 'stating the nature and legal

The Ecclesiastical Committee.

[1] Annual volumes are published containing the Statutory Rules and Orders of the year. A complete set of the Statutory Rules and Orders revised up to 1903 has also been published in thirteen volumes. On the subject of subordinate legislation generally, the student may be referred to Ilbert, Legislative Methods and Forms, chap. iii, and to C. T. Carr, Delegated Legislation.

[2] 9 & 10 Geo. 5, c. 76.

effect of the measure and its views as to the expediency thereof, especially with relation to the constitutional rights of all His Majesty's subjects.' This report is communicated to the Legislative Committee but is not presented to Parliament until that Committee signify its desire that this should be done. The report of the Ecclesiastical Committee, together with the text of the measure, is then laid before both Houses of Parliament, and the measure is presented to His Majesty for the Royal Assent, if each House passes a resolution to that effect; and on the Royal Assent being signified in the same manner as to Acts of Parliament the measure has the force and effect of an Act of Parliament.

An Ecclesiastical Measure may relate to any matter concerning the Church of England, and may extend to the amendment or repeal in whole or in part of any Act of Parliament, including the Church of England Assembly (Powers) Act, 1919; but it may not make any alteration in the composition or powers or duties of the Ecclesiastical Committee, or in the procedure in Parliament prescribed by the Act. The following is an example of the form of an Ecclesiastical Measure :—

A

MEASURE

passed by

THE NATIONAL ASSEMBLY

OF THE CHURCH OF ENGLAND

Declaring the power of each of the Convocations of Canterbury and York to amend the constitution of the Lower House thereof. [December 23rd, 1920.]

WHEREAS by the constitution of the National Assembly of the Church of England as defined in the Church of England Assembly (Powers) Act 1919 it is provided that the said Assembly shall before entering on any other legislative business make further provision for the self-government of the Church by passing through the Assembly (*inter alia*) a measure declaring that the Convocations of Canterbury and York have power by Canon lawfully passed and promulged to amend the constitution of the Lower Houses thereof :

1. It is hereby declared that the Convocation of each of the

said Provinces has power with His Majesty's Royal Assent and Licence to make promulge and execute Canons for the amendment of the constitution of the Lower House thereof.

2. This Measure may be cited as the Convocations of the Clergy Measure, 1920.

Inasmuch as a Measure only has the force of law by the Royal Assent being signified thereto, the absence of any enacting words or indeed of any reference whatsoever to the part played by the Crown or by the Houses of Parliament in the passing of the Measure is not a little surprising.

The procedure above described affords an example of a very interesting experiment. Measures which, though they do not become law without the intervention of Parliament, are nevertheless the work of another body, and which can repeal or amend Acts of Parliament, are a striking constitutional novelty. This method of law-making has perhaps in it the germs of further development, and is susceptible of being made applicable to other bodies than the Church of England. Its working, therefore, will be closely watched by all students of constitutional law.

CHAPTER VII

THE CROWN IN PARLIAMENT

We have now traced the progress of a bill up to the point at which it has received the assent of both the Houses, of the Lords Spiritual and Temporal and the Commons in Parliament assembled. In order that it may become law it still requires the Royal assent: it requires to be 'enacted by the King's most excellent Majesty.'

Topics to be dealt with.

We come, therefore, to the functions of the Crown in Parliament; these extend beyond the mere process of enacting, and fall under three heads.

First, we may regard the Crown as constituting Parliament and bringing it to an end.

Secondly, we may regard the Crown as communicating with Parliament while Parliament is sitting.

Lastly, we may regard the Crown as a party to legislation, as giving validity to laws proposed by Parliament, as turning a bill into an act.

§ 1. *The Crown as constituting Parliament.*

It is the King who constitutes Parliament; the Houses meet by Royal invitation; they assemble in the Royal Palace at Westminster[1]; they are opened by the Royal permission; they continue in existence and working during the Royal pleasure.

Securities for summons and session of Parliament.

The process of summoning, opening, proroguing, and dissolving Parliament has been described in an earlier chapter. It will therefore be sufficient to note here the obligations which rest upon the Crown to call a Parliament into existence, and to enable a Parliament, while it is in existence, to sit.

The Statutes which have been passed on this subject are

[1] The Houses of Parliament are described in a Statute (see 30 & 31 Vict. c. 40) as Her Majesty's new Palace at Westminster, commonly called the Houses of Parliament. For the character of the building as a Royal Palace, see *Combe* v. *Delabere*, 22 Ch. D. 333.

our; and of these only one remains in force; so scanty s the direct legal security for the frequent summons and ession of Parliament.

Annual Parliaments.

The first is 4 Edw. III, c. 14, which enacts that 'a Parliament shall be holden every year once, and more if need be'; this was re-enacted in the thirty-sixth year of the ame reign, but the words 'if need be' seem to have been reated as applying to the whole clause, and Parliaments vere often intermitted for years together. This Statute vas repealed by the Statute Law Revision Act, 1863.

Triennial Parliaments.

The second was an Act of the Long Parliament, 16 Car. I, c. 1. This Act provided that if the King neglected to call a Parliament for three years, the peers might issue out writs, and that if the peers neglected to do so, the constituencies might elect a House of Commons for themselves. The loyalty of the succeeding reign repealed this Statute in 1664 as being 'in derogation of His Majesty's just rights and prerogative inherent to the imperial crown of this realm.' And indeed it proceeded on the assumption, reasonable in itself, though unhistorical, that the Lords and Commons assembled, not because the King wanted their advice, but because they desired, and because the constituents of the members of the Commons desired, that the action of ministers should be discussed by persons who, though not responsible for the conduct of public business, had an interest in seeing that it was conducted well.

Triennial Session.

But the Act[1] of Charles II did something besides repeal the Act of the Long Parliament, for it provided that '*the sitting and holding* of Parliament shall not be intermitted or discontinued above three years at the most.' This was repealed by the Statute Law Revision Act, 1887.

The fourth is 6 Will. & Mary, c. 2, still in force, which provides:—

Triennial summons.

'That within three years at the farthest from and after the dissolution of the present Parliament, and so from time to time ever hereafter, within three years at the farthest from and after the determination of every other Parliament, legal writs under

[1] 16 Car. II, c. 1.

the great seal shall be issued by directions of your Majesties, your heirs and successors, for calling, assembling and holding another Parliament.'

Statute does not secure annual sessions,

It would seem then that, apart from the general expression of the Act of Edward III, the only statutory securities which we have ever possessed for the frequent summons and sitting of Parliament are the Act of Charles II, providing that Parliament shall sit at least once in every three years, and the Act of William and Mary to the effect that we shall not be more than three years without a Parliament.

Nor do the Statutes say what is to happen if the Crown fails to carry them into effect. The Long Parliament devised machinery to meet such a case, but subsequent Parliaments appear to have thought it disloyal to provide for the contingency that the Crown might not fulfil the Law.

nor does the need of supply;

It is sometimes said that the necessities of supply compel the Crown to an annual summons of Parliament. But, as has been already pointed out,[1] much of our taxation is now permanent, and government might fairly be carried on for a while without those annual taxes which every session increases or diminishes.

but of appropriation of supply;

It is not the need of supply, but of the appropriation of supply and of the Army Act, which makes it legally necessary for Parliament to sit every year. If Parliament did not appropriate the supplies of the year to specific purposes, the money which is provided by taxation could not legally be paid out to meet the services of the year, except in the case of such charges upon the revenue as are permanently authorized by statute. The interest upon the national debt would be paid, but not the wages of sailors serving on board of His Majesty's ships, nor the regimental pay of His Majesty's land forces. The salaries of the judges would be paid, but not the salaries of the civil service, or the bills for furniture and repairs in the offices of the public departments. Enough money would come in to meet some, though not all, of these charges, but the authority to pay a large part of the

[1] *Ante*, p. 291.

nation's liabilities would be wanting, and there would be no one in the kingdom who could make the payments without committing a breach of duty[1].

and of the Army Act.

And the absence of any authority to pay the officers and men in His Majesty's army would not be the only difficulty which the army would occasion if the sitting of Parliament should be intermitted for a year. The existence of a standing army in time of peace is contrary to law. It is legalized each year, for a year, by the Army Act. Again, the punishments and procedure for the maintenance of discipline in a large body of troops are contrary to the common law of the land, as declared by several statutes. They, too, are legalized by the Army Act which brings into force each year, for a year, a code of military law[2]. These are the only practical securities for the summons of Parliament with tolerable frequency, but they neither impose any penalty nor supply any alternative machinery in case the Crown should make default in fulfilling the Statutory requirements as to the issue of writs of summons.

The prerogative of dissolution

The prerogative of dissolution gives rise to difficult and intricate questions.

The right of the King to dissolve Parliament is unquestionable; in fact one may say that, within the five years' limit prescribed by the Parliament Act, the King holds the life of a Parliament in his hands. But for a dissolution of Parliament effected by the sovereign *proprio motu* without the advice or against the advice of his ministers we must go back to the days before responsible government. Macaulay describes William III, in 1701, hesitating as to the prospects of a dissolution, deciding finally, on his own responsibility, to dissolve, in the expectation that a Whig majority would be returned and that he would be able, once more, to employ the ministers in whom he trusted. We see here the prerogative exercised in complete independence of ministerial advice. But whether the King should grant or refuse a dissolution when asked by his ministers to dissolve is a matter of comparatively recent discussion.

[1] See vol. ii, part ii, ch. vii.

[2] Ibid.

Ministers and the claim of a dissolution

It is plain from the Letters of Queen Victoria that Lord Melbourne had conveyed to the Queen's mind an impression that a dissolution of Parliament did not mean so much an appeal by ministers to the country for approval of their policy, as an appeal by the Queen to the country on behalf of her ministers. He is reported by the Queen in 1841 as saying that the return of a majority in favour of the Opposition would be 'an affront to the Crown[1].' And Queen Victoria reaffirms this principle in a letter to Lord John Russell, who had suggested a dissolution in 1846[2]; she speaks of the power of dissolving Parliament as 'a most valuable and powerful instrument in the hands of the Crown, but one which ought not to be used except in extreme cases, *and with a certainty of success*. To use this instrument and be defeated is a thing most lowering to the Crown and hurtful to the country.'

Later she received advice of a different character from that given by Lord Melbourne.

as an alternative to resignation.

In 1858 Lord Derby, when threatened with a vote of censure in the House of Commons, asked the Queen's leave to say that if the vote was carried Parliament would be dissolved. The Queen naturally declined to allow a threat to be uttered which would have brought in her name to influence debate, but she also consulted Lord Aberdeen on the point. His advice was instructive, for while he expressed no doubt as to the right of the Queen to refuse a dissolution to her ministers on her own responsibility, he points out that if such ministers asked for a dissolution as an alternative to resignation—that is, if the vote of censure had been carried and Lord Derby had then asked the Queen to dissolve—her refusal would have been tantamount to a dismissal, and the successors of the ministry would be responsible for what had taken place and would have to defend it in Parliament. In fact he says that 'he had never entertained the slightest doubt that if the minister advised the Queen to dissolve, she would, as a matter of course, do so[2].'

The Crown does not refuse.

This seems to have been the view of the matter accepted

[1] Letters of Queen Victoria, i. 348. [2] Ibid. ii. 108.

by Queen Victoria in the subsequent years of her reign,[1] and it is of considerable importance in relation to party politics.

Effect on Parliamentary discipline.

If a minister is certain that Parliament will be dissolved as a matter of course on his request, there is no reason why he should not announce his intention to ask for a dissolution, and use his announcement to influence waverers in an approaching party division or followers who are slack in attendance and support.

In fact the power of dissolution is a formidable disciplinary weapon in the hands of a Prime Minister, and becomes more formidable as the rapidly changing opinions of the modern electorate make the prospect of a general election more unwelcome to the member who values his seat.

When should claim be made?

We may say then that the prerogative of dissolution is one which the King exercises on the advice and at the request of his ministers and that a request is not refused. It remains to consider when this request may properly be made.

Shortly it may be said that a dissolution is rightly demanded whenever there is reason to suppose that the House of Commons has ceased to represent the opinion of the country.

1895. If a Prime Minister who has still a majority in the House of Commons resigns after a casual defeat, as did Lord Rosebery in 1895, or resigns because he considers that his programme is exhausted, as did Mr. Balfour in 1905, his successor can only take office on the understanding that Parliament will be dissolved at the earliest opportunity so as to afford the country a means of expressing its opinion on the new ministry.

1905.

If a minister is defeated in the House of Commons on a measure which he believes will be acceptable to the country, he may appeal to the electors to decide between him and the House of Commons. This is what was done

[1] Lord Beaconsfield, however, writing to the Queen on the 14th February 1880, uses language which recalls that of Lord Melbourne in 1841: 'If the factious spirit were continued or revived, then they [the Government] would recommend your Majesty to appeal to your people at all risks'. Life of Disraeli, vi. 512.

by Mr. Gladstone in the case of the Home Rule Bill of
1886. 1886.

Or again a series of by-elections adverse to a Government may incline a minister to dissolve in order to obtain an expression of opinion from the country. Such was the
1874. action of Mr. Gladstone in 1874.

These are the usual grounds on which a dissolution is demanded, but they represent different forms of the same proposition, namely, that a dissolution is rightly demanded if there is reason to suppose that the House of Commons and the majority of the electorate are at variance[1].

Some doubtful points may be noted.

Doubtful cases.

Change of electoral conditions.

When any large change is made in electoral conditions, as in 1832, in 1867–8, in 1885, and in 1918, it is proper that those new conditions should be put to the test and the newly enfranchised enjoy their new rights at the earliest opportunity. As soon, therefore, as the machinery is perfected, a dissolution takes place. But it happened both in 1868, and in 1885, that, while Parliament was still engaged in perfecting this machinery, the Government of the day suffered defeat in the House of Commons. Mr. Disraeli in 1868 retained office until the result of a general election was ascertained; Mr. Gladstone in 1885 resigned, Lord Salisbury took his place, and, with his colleagues, though in a minority in the House of Commons, wound up the business of the session, and governed the country until defeated in the new Parliament.

Each case presented difficulties of the same sort. The House of Commons could not be relied on to support the Government, the Government, not unnaturally, doubted whether the House was in accord with the country, but to dissolve and appeal to the old constituencies using the old machinery when it was certain that a new House of Commons would have little to do except perfect that machinery and

[1] The dissolution after the rejection of the Finance bill of 1909 by the House of Lords was altogether exceptional. The action of the Lords left ministers no alternative; but for that very reason implied a claim by persons other than the responsible advisers of the Crown to compel a dissolution: *ante*, p. 307.

then make another appeal to the constituencies, would have been waste of time, trouble, and money.

The mandate.

The necessity of appealing to the country as soon as possible after a change in electoral conditions stands on a very different footing from the modern theory of 'the mandate.' According to some political thinkers no novel or important legislative measure ought to be introduced in Parliament unless it has been brought prominently to the notice of the constituencies at a previous general election.

Doubtless at some general elections some great changes have been definitely and prominently placed before the electors, notably the disestablishment of the Irish Church in 1868 and the extension of the franchise in 1880. But there is also no doubt that other very important measures have been introduced into Parliament with no such preparatory consideration. Many instances could be found in earlier days; perhaps the most striking in recent times is the Home Rule Bill of 1886, which was certainly no part of Mr. Gladstone's programme at the general election of 1885.

The question was frequently raised in regard to the Parliament of 1900, which was returned, as was alleged, to enable the Unionist Government to conclude the war in South Africa, but which was afterwards invited to pass, and did pass, important bills dealing with education and licensing.

It is enough to state the theory without further comment. The chiefs of either party can always guard themselves against the charge of acting without a mandate, by an extension of their programme to include all the matters on which they may desire to legislate; and unless the *referendum* is to become part of the law of the land, it is necessary that the electors must repose some general confidence in those whom they send to represent them.

The King retains the prerogative.

The direct action of the Crown in causing or refusing a dissolution may be said to have ceased; but the prerogative exists. Where the King has thought that his ministers and his Parliament were alike out of harmony with the country he has dismissed his ministers, as George III

did in 1783, or promoted if not suggested a change of Government as William IV did in 1834, and has then granted a dissolution when his new ministers asked for one. George III proved to be right in gauging the opinion of the country. William IV was premature. The cases serve to remind us that the prerogative might conceivably be a resource where a Ministry and House of Commons were alike out of harmony with the country and were unwilling to admit the fact.

§ 2. *The Crown in communication with Parliament.*

The Crown, if it desires to communicate with either House of Parliament, can only do so by speech from the throne at the opening and close of session or by message in one form or another. For though the King is entitled to be present on his throne during the debates in the House of Lords, he might not take part in them. The speech from the throne which opens and concludes the business of Parliament was formerly an address to both Houses delivered in person, and capable of being charged with exhortation or rebuke adapted to the prospects or the history of the session. These speeches now contain formal statements as to the foreign relations of the country, communications of topics of legislation to be proposed by ministers, remarks on the condition of trade, on the weather in connexion with the harvest, and, at the close of the session, expressions of thanks for the supplies granted and congratulations on the additions to the statute-book which the labours of the session have produced.

Speech from the Throne.

The presence of the King at the sittings of the House of Lords in the mediaeval Parliaments appears to have been very common[1]. The decision of Henry IV, relating to the right of the Commons to the exclusive dealing with supply, is called the 'Indemnity of the Lords and Commons[2],' and in so far as it contains a permission to the Lords to transact business in the absence of the Crown, it suggests that the House of Lords in the reign of Henry IV still retained so much of the character of the King's Council as

Royal presence in the House of Lords.

Ante, *p.* 281.

[1] Stubbs, Const. Hist. iii. (5th ed.) 497. [2] Rot. Parl. iii. 611.

to make the presence of the King necessary to the due transaction of its business.

But, however this may be, the practice had become so unusual by the reign of Charles II, that the Lords were uncertain what business of the House could be transacted in his presence. On one occasion Charles came unexpectedly into the House when it was sitting in Committee, and thereupon the sitting of the House was resumed. But the King said 'that he is come to renew a custom of his predecessors long discontinued, to be present at debates but not to interrupt the freedom thereof: and therefore desired the Lords to sit down, and put on their hats, and proceed with their business.' Whereupon 'the Lords again taking their places and putting on their hats the House was again adjourned into a Committee during pleasure [1].'

Charles II was a frequent attendant at debates, being present at as many as forty-three out of eighty-nine in the session of 1672–3, and upon one occasion in the session of 1671 he rebuked the Lords for their disorderly conduct, desiring them 'not to prophane such a presence as this with the like disorder, but keep their places and proceed in businesses according to their orders prescribed in the House [2].'

Since the death of Queen Anne the presence of King or Queen during debates in Parliament has been discontinued. The ceremonies of opening, prorogation or dissolution of Parliament, and of giving the royal assent to bills are the only occasions on which the King is present in the House of Lords.

In the Commons.

His presence during a debate in the House of Commons would be something very different from a revival of a practice long disused. Charles I seems to have been the only sovereign [3] who has thus ventured to violate the rights of the Commons to freedom and secrecy of debate. The Journals of the House for the 4th of January, 1642, contain the only authentic record of a situation incompatible alike

[1] 12 Lords' Journ. 318.

[2] 12 Lords' Journ. 413.

[3] Gardiner, History of England (1884), x. 139. There is however some authority for visits of Henry VIII to the Commons' house: Ilbert, Legislative Methods and Forms, pp. 77–8.

with the dignity of the Crown and the privileges of the Commons.

The entry of the preceding business is interrupted, and the report runs :—

His Majesty came into the House and took Mr. Speaker's chair.

'Gentlemen,

'I am sorry to have this occasion to come unto you.' . . . .

The journal breaks off abruptly, and its silence is significant [1].

Royal messages,

under sign manual,

reported *verbatim*,

informal.

The Crown therefore, except on the occasions mentioned, must communicate with the Houses by messages, and these may be either formal, under the sign manual delivered to the Lord Chancellor in the one House, and to the Speaker in the other, and received by members uncovered : or of a less formal character, but reported verbatim by a minister or officer of the household to the House of which he is a member: or lastly, it is permissible for a minister to communicate to the House in the course of debate a statement from the Crown, but this only 'if it relates to matters of fact, and is not made to influence the judgment of the House, and then only with the indulgence of the House [2].'

Apart from these modes of address, the Crown has no means of communicating with Parliament. Nor are these used except upon formal occasions. The King can direct the attention of the Houses to certain matters in his opening speech. He can while they are sitting communicate a request for supply, or place at the disposal of the country some matters of royal interest or prerogative ; he can, at the close of the session, if he choose, comment upon the conduct of business and the progress of legislation. All measures introduced or advocated by the King's ministers are assumed to have the royal approval, but to introduce into debate in either House any allusion to the personal wishes of the King, or to use His Majesty's name in such a manner as to influence the judgement of members, is contrary to the rules of the Houses.

Use of King's name in debate.

[1] 2 Com. Journ. 368.

[2] 227 Hansard, 3rd Series, p. 2037.

Thus during the session of 1876 a member of the House of Commons made at a public meeting a statement to the effect that a measure then before the House had been brought forward in deference to the personal wishes of the Queen. Mr. Disraeli, who was then Prime Minister, desired to contradict this statement on behalf of the Queen and with her authority. He said, 'I can only speak with the indulgence of the House. I have the authority of Her Majesty to make a statement on her part, but at the same time, as I have felt it my duty to place before Her Majesty the fact that it is not in accordance with the rules of the House that the name of the Sovereign can be introduced into debate without the permission of the House—it therefore rests with the House whether I shall go on. If the House desires it I shall do so.'

Mr. Speaker thereupon said, 'As the House is aware, one of the rules of the House is this—that the introduction of the Queen's name into debate, with a view to influence the decision of the House, would certainly be out of order. At the same time, if the statement of the right honourable gentleman relates to matters of fact, and is not made to influence the judgment of the House, I am not prepared to say that, with the indulgence of the House, he may not introduce Her Majesty's name into the statement[1].'

The House is the ultimate authority in the matter, and may set aside its own conventions, if it so please, and if occasion require.

§ 3. *The Crown as a party to Legislation.*

Legislation without the Crown.

We have still to consider the action of the Crown as a party to legislation, and looking back at the history of this matter, and noting, as we have had to do, the large share of legislative power which the Crown once possessed, we are apt to forget that laws have been passed to which no royal assent was given; we are apt to forget the episode of the Commonwealth; the restoration of Charles II; the resolution of the Lords and Commons that the Crown should be offered, on the abdication of James II, to William and

[1] 228 Hansard, 3rd Series, p. 2037: Life of Disraeli, vi. 477–9; and cf. debate of Dec. 14, 1921, on the Irish Agreement, 149 Parl. Deb. 5th Ser. 44.

Mary; the strange conclusion at which Lord Chancellor Thurlow arrived during the insanity of George III, in 1788, that he could put the great seal to a Royal Commission empowering him to give the royal assent to Acts of Parliament.

We may leave out of consideration the makeshifts to which constitutional lawyers may be reduced when the throne is vacant or its occupant insane. All that can be done under such circumstances is to supply, as soon as may be, the deficiency in the constitution. Apart from catastrophes which need to be dealt with as may best suit the circumstances of each case, we may safely join with the second Parliament of Charles II in holding that there is no truth in the 'opinion that both Houses of Parliament, or either of them, have a legislative power without the King,' an opinion the expression of which rendered its holder liable, by the same statute, to the penalties of a *praemunire*.

The royal assent:

When a bill has passed through all the necessary stages described above, it is ripe to receive the royal assent, and this assent is given by the King in person or by commission.

in person,

If the King should come to Parliament in person, every bill which is ready for the royal assent would necessarily be presented to him for assent or rejection, and could not be withheld.

by commission;

In the same manner, when a commission is issued to give the royal assent, every bill which is ready should be included in a schedule annexed to the commission. No bills are allowed to reach their final stage, after a commission has been issued, until it has been acted upon, for otherwise the commission would need to be altered so as to include them.

It seems to have been regarded as doubtful at one time whether the Crown by assenting to a single bill did not thereby terminate the session of Parliament[1], and as late as 1670 a clause was inserted into an act providing that 'His Majesty's royal assent to this bill shall not determine this session of Parliament[2].' But the doubt has been cleared up without express enactment or decision upon the

[1] Gardiner, History of England, iv. 127.

[2] 22 & 23 Car. II, c. 1.

point, and the royal assent is now given to bills as soon as they are ready to receive it. The validity of the royal assent by commission is certified by 33 Henry VIII, c. 21, the Act for the attainder of Queen Catherine Howard. It is declared in that Act— formal requisites.

'That the King's royal assent by his letters patent under his great seal *and signed with his hand*, and declared and notified in his absence to the Lords spiritual and temporal and to the Commons assembled together in the high house, is and ever was of as good strength and force as though the King's person had been there personally present and had assented openly and publicly to the same.'

And also—

'That this royal assent and *all other royal assents hereafter to be so given* by the Kings of this realm and notified as aforesaid, shall be taken and reputed good and effectual to all intents and purposes without doubt or ambiguity; any custom or use to the contrary notwithstanding.'

The provisions of this Act are followed, and the commission is under the sign manual as well as the great seal. The only departure from the law on this subject was in the case of the Regency Bill of 1811, when George III was incapable of expressing any rational intention, and a commission was nevertheless sealed for the purpose of giving his assent to the bill.

There are three forms of expressing the royal assent to a bill. A public bill[1] is made law by the expression of the royal assent in the same form as that in which the kings of the fourteenth century were wont to reply to petitions for legislation. A favourable answer was couched in the words 'le roy le veult'; but if the King was unwilling to legislate he was also anxious not to offend by a curt refusal, and he 'smiling put the question by' with the words 'le roy s'avisera.' Modes of expression: (*a*) to a public bill. The royal veto:

These words, which amount to a veto upon legislation,

[1] The expression includes for this purpose local and other bills to which the private bill procedure already described (*ante*, pp. 311 *et seq.*) is applicable, with the exception of bills of a personal nature, such as divorce and estate bills; see *post*, p. 337.

have been seldom used since legislative procedure assumed its modern shape, save in the reign of William III.

The frequent use of this veto by William III was probably due to the recent limitations imposed by the Bill of Rights on the suspending and dispensing power. His position differed in some respects from that of his predecessors and successors.

why not used by Tudors or Stuarts,

The Tudor monarchs, with their packed Parliaments, ran no great risk of being asked to assent to legislation of which they disapproved, although Elizabeth exercised the right of rejecting bills on at least one occasion very freely[1]. The Stuarts, with their exalted ideas of the prerogative, might readily assent to legislation from which they held themselves entitled to be set free by the use of the dispensing and suspending powers.

or at the present time ;

If, on the other hand, the King in modern times disapproved of proposed legislation, he would begin his opposition earlier. He can inform his ministers that a bill which they intend to propose is distasteful to him, and that he cannot entertain it. If the ministers insist upon their measure he can dismiss them and employ others, in the hope that those others may be supported by Parliament. He thus appeals from his ministers to Parliament. If Parliament, in its desire for this particular measure, refuses its confidence to the new ministers, and puts them in a minority on divisions upon important questions, the King has one more resource. He can dissolve Parliament and appeal to the country. If the constituencies return a new Parliament pledged to the measure of which the Crown disapproves, this last resource has failed. It remains for the Crown, in the words of Lord Macaulay, 'to yield, to abdicate, or to fight.'

its use by Will. III.

William III had neither a packed and submissive Parliament, nor a dispensing power, nor yet a responsible Ministry. He could not through ministers make his wishes felt in the inception of a bill, and being bound to observe the laws to which he assented, he chose to be circumspect in giving his assent. To a nation used to the arbitrary dealings of the Stuarts, the use of his veto by William was not regarded

[1] Parl. Hist. i. 905.

as a violation of constitutional usage. This may account for the fact that his refusal to assent to measures so important as the Place Bill and the Bill for Triennial Parliaments, when they first were presented to him, did no more than cause disappointment. But in this respect his reign must be regarded as a transition period. Anne exercised the veto once, when in 1707 she refused her assent to the Scotch Militia Bill. Since then the words 'le roy s'avisera' have never been used.

(*b*) To a personal bill, or claim of right.

A bill of a personal nature, such as a divorce bill, receives the royal assent in a different form, suggesting its character as a private petition, by the words '*soit fait comme il est désiré.*'

A claim of right is granted in a form very nearly similar to this. The Petition of Right received the assent of Charles I in the words '*soit Droit fait comme il est désiré.*' The Petition was a claim of Public Right, and the answer given in these terms constituted the Petition a declaratory Statute.

(*c*) To a money bill.

A money bill is a grant of supply or an appropriation of supply granted by the Commons to the Crown, and it needs for its efficacy the assent of the Lords and the Crown. The form of assent to such a bill is '*Le Roy remercie ses bons sujets, accepte leur bénévolence et ainsi le veult.*'

The process of giving the Royal assent by Commission may be illustrated by an extract from the Journal of the House of Lords for the year 1920.[1]

The Lord Chancellor, on the 16th August in that year, acquainted the Lords that 'His Majesty had been pleased to issue a Commission to several Lords therein named for declaring His Royal Assent to several Acts agreed upon by both Houses of Parliament.'

The Lords Commissioners sent to desire the attendance of the Commons, and the Commons attended with the forms described in a preceding chapter, the Speaker bringing with him the Appropriation Bill. Then the Lord Chancellor said:—

'My Lords and Gentlemen of the House of Commons,

His Majesty not thinking fit to be personally present here at this time, has been pleased to cause a Commission to be issued

[1] 102 Lords' Journ. 407, 410.

under the Great Seal, and thereby given His Royal Assent to divers Acts which have been agreed upon by both Houses of Parliament, the titles whereof are particularly mentioned; and by the said Commission hath commanded us to declare and notify His Royal Assent to the said several Acts in the presence of you the Lords and Commons assembled for that purpose: which Commission you will now hear read.'

The Commission was thereupon read, and the schedule containing the titles of the Acts to which assent was to be given, and the Lord Chancellor then spoke again :—

'In obedience to His Majesty's commands and by virtue of the Commission which has been now read, we do declare and notify to you the Lords Spiritual and Temporal, and Commons in Parliament assembled, that His Majesty hath given His Royal Assent to the several Acts in the Schedule to the Commission mentioned: and the Clerks are required to pass the same in the usual form and words.'

Then the Clerk of the Parliaments, having received the Money Bill from the hands of the Speaker, brought it to the table, where the Clerk of the Crown read the titles of that and other Bills to be passed, severally as follows, viz.:

'Appropriation Act, 1920.

To this Bill the Royal Assent was pronounced by the Clerk of the Parliaments in these words:

"Le Roy remercie ses bons sujets, accepte leur benevolence, et ainsi le veult."

Then the Clerk of the Crown at the table read the titles of the Bills to be passed severally, as follows:

Maintenance Orders (Facilities for Enforcement) Act, 1920.

Duplicands of Feu-duties (Scotland) Act, 1920.

(and a number of others.)

To these Bills the Royal Assent was pronounced by the Clerk of the Parliaments in these words:

"Le Roy le veult."

Osborne's Divorce Act, 1920.

Shekleton's Divorce Act, 1920.

To these Bills the Royal Assent was pronounced by the Clerk of the Parliaments in these words:

"Soit fait comme il est désiré."'

On the 23rd of December in the same year the Royal Assent was given to other bills and also, for the first time, to an Ecclesiastical Measure :—

'Convocations of the Clergy Measure, 1920.

To this Measure the Royal Assent was pronounced by the Clerk of the Parliaments in these words :

"Le Roy le veult".'[1]

In 1876 a question was raised as to the validity of a royal assent given by commission while the Queen was on the continent. A statute of the 2nd William and Mary had given efficacy to 'acts of royal power' done by the King during his absence from the realm ; and it was not considered necessary to create Lords Justices with delegated powers or to legislate afresh upon the subject.[2]

Until 1793 an Act of Parliament commenced its operation from the first day of the Session in which it was passed. The Statute 33 Geo. III, c. 13 provided that the date on which a Bill received the royal assent should be endorsed upon it by the Clerk of the Parliament, and that 'such endorsement shall be taken to be part of such Act and to be the date of its commencement, where no other commencement shall be therein provided.' It is usual now to provide in the bill for the date at which it shall come into operation, and the date may vary, one part of a bill may come into operation sooner than another, or the commencement of its operation may be made to depend upon various conditions, such as the action, within prescribed limits, of local authorities.

The area of Parliamentary sovereignty is co-extensive with the dominions of the Crown, and as regards crime, may cover offences committed by British subjects outside the King's dominions : but an Act of Parliament is presumed to extend to the whole of the United Kingdom, and not beyond, unless words are expressly used to extend or to limit its scope.[3]

[1] 102 Lords' Journ. 598. *Ante*, p. 319.

[2] May, Parl. Practice (ed. 12), p. 396.

[3] Ilbert, Legislative Methods and Forms, pp. 275–6. It seems doubtful, however, if this presumption will still hold good in the case of an Act relating to matters on which the Northern Ireland Parliament now has power to legislate for its own area. The presumption in such a case would seem to be that the Act did not apply to Northern Ireland.

CHAPTER VIII

THE EXECUTIVE AND LEGISLATURE IN CONFLICT

The constitution of our Parliament, and its action in Legislation, have now been described. It may be a matter of interest, though that interest is almost entirely historical, to note the direct invasion of the rights of Parliament by the Crown in the sixteenth and seventeenth centuries; and the indirect but none the less potent influence brought to bear upon the legislature by the executive when the door of direct encroachment had been closed by statute.

The Crown, as being at once the executive and a branch of the legislature, is also that branch of the legislature which at one time assumed to itself legislative powers which were incompatible with the sovereignty of Parliament, at another has endeavoured to obtain by influence those powers which statute had taken away.

The Crown has (1) tried to legislate independently of Parliament; it has (2) tried to nullify legislation effected in the entire Parliament by dispensing with the operation of statutes in individual cases, or (3) by suspending their operation altogether; it has (4) tried to raise money without parliamentary grant; it has (5) tried, personally or through its ministers, to influence the legislature by the corruption of members or the corruption of constituencies.

§ 1. *Royal Proclamations.*

Legislation by ordinance,

The assumption by the Crown of independent legislative powers found some warrant in the identity, in early times, of the executive and the legislature, and in the very gradual definition of the functions of the King in Council and the King in Parliament. Legislation by way of Ordinance continued for some time after Parliament had acquired legislative power, and often with the sanction and approval of Parliament. We have spoken of the legislative character of the ordinance as distinguished from statute, and of the jealousy with which this form of legislation came to be

regarded. This quickened as the confusion between the Executive and the Legislature cleared away, and as Parliament, and especially the Commons, realized the importance of insisting upon the observance of the terms of the Statute of Edward II, whereby the consent of prelates, earls, barons, and the commonalty of the realm was required to matters which were to be established 'for the estate of the king, the realm, and the people.'

Legislation by ordinance, which had been denounced at the end of the fourteenth century, disappeared during the fifteenth, but revived in the sixteenth in the form of legislation by Royal Proclamation.

revived in Proclamation.

The modern form of Proclamation has already been set forth in an earlier part of this book, but the Proclamations of the Tudor sovereigns were a great deal more than ministerial acts summoning or proroguing Parliaments, or exercising powers conferred upon the Crown by Statute. They made new laws, new offences, new punishments; and the offences were tried and the punishments inflicted by the Court of Star Chamber.

Statute of Proclamations.

Henry VIII, who was skilful in extending the discretionary prerogative by legal means, and in obtaining from Parliament an increase of powers which it was the duty of Parliaments to control, procured in 1539 the passing of the Statute of Proclamations[1]. The statute recited the inconvenience and risk of waiting for Parliament to deal with cases which needed prompt action. The laws and customs of the realm, and the person and property of the individual were professedly guarded: but the Act provided that Proclamations made by the King, with the advice of his honourable council, or of a majority of his council, 'should be observed and kept as though they were made by an Act of Parliament,' and permitted the enforcement of these proclamations by such pains and penalties as the King and Council might deem requisite. Such an Act was, as Dr. Stubbs describes it, 'a virtual resignation of the essential character of Parliament as a legislative body; the legislative power won for the Parliament from the

[1] 31 Hen. VIII, c. 8.

King was used to authorize the King to legislate without a Parliament [1].'

Proclamations under Edward VI.

The Statute of Proclamations endured but for a short time; it was repealed by 1 Edward VI, c. 12, s. 5, but the practice continued, and though royal proclamations had no longer a statutory force, they were used to introduce ecclesiastical changes and social and economic regulations; they were enforced by penalties of fine, imprisonment, and even slave labour on the galleys [2]. In the reign of Mary the validity of such proclamations was called in question, and the judges at once assigned to them their true legal character as statements of existing law, and not sources of new law.

Mary.

'The King, it is said, may make a proclamation *quoad terrorem populi* to put them in fear of his displeasure, but not to impose any fine, forfeiture or imprisonment; for no proclamation can make a new law, but only confirm and ratify an ancient one [3].'

Nevertheless the Tudor queens continued to legislate by way of proclamation more freely than the kings of the fourteenth century had ever ventured to do by ordinance.

Elizabeth.

Impositions were laid upon imported goods, sumptuary rules were made as to the building of houses, and the quality of apparel; trade regulations were enforced by punishments in excess of those which the common law would have inflicted.

James I.

James I followed the same course. In the proclamation by which he summoned his first Parliament he tried to limit the choice of the electors by describing the quality of the candidates to be elected, and the discretion and duties of the sheriff by a charge that writs were not to be sent to ancient or depopulated towns. By proclamations also he levied impositions on merchandise; a matter which will recur later. He interfered in various ways with personal liberty and freedom of trade [4], bidding country gentlemen to leave London and go and maintain hospitality in their own houses, forbidding the increase of buildings about

[1] Stubbs, Const. Hist. ii. (5th ed.) 619.

[2] Hallam, Hist. of England, i. 37.

[3] Ibid. i. 337.

[4] For specimens of such proclamations, see Rymer; Old edition, xvii. 417, 607; Hague edition, vol. vii, part 4, pp. 16, 143.

London, and the making of starch out of wheat. But at this point Coke was consulted as to the legality of these proclamations; he asked leave of the Council to confer with some of his brethren on the Bench, and three judges were appointed to assist him. The result of their consideration may be regarded as final:— Judicial opinion on their validity, 1610.

'1. The King by his proclamation cannot create any offence which was not one before; for then he might alter the law of the land in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment.

'2. The King hath no prerogative but what the law of the land allows him.

'3. But the King, for the prevention of offences, may by proclamation admonish his subjects that they keep the laws and do not offend them, upon punishment to be inflicted by law: the neglect of such proclamation aggravates the offence.

'4. If an offence be not punishable in the Star Chamber the prohibition of it by proclamation cannot make it so[1].'

Here are set forth in a few words some salient features of our Constitution: and this at a time when a clear statement of the points at issue between Crown and Parliament was greatly needed, and when the first step to be taken towards a settlement of constitutional difficulties was that the nature of those difficulties should be understood. Constitutional value of the opinion.

The King's prerogative is ascertainable by rules of law, and is limited by those rules; he cannot make new nor alter existing laws, nor create new offences, nor constitute new courts for the trial of offences otherwise provided for. He is the executive, his business is the enforcement of existing law. If he thinks he can best enforce it by proclaiming it, he is welcome to do so. The judges in awarding sentence upon offenders against the law so proclaimed may fairly consider that the warning aggravates the offence.

If one asks where is the law to be found by which the King's prerogative is determinable, the answer is 'in statutes, in judicial decisions, in the customs of the realm.' If one Limitation of prerogative.

[1] 12 Co. Rep. 74, 75.

asks what power in the State can do that which Coke says the King can not do, the answer is that the Crown in Parliament can make, unmake, and alter the law which it is the duty of the Crown in Council to administer.

The indefinite jurisdiction of the Star Chamber was at this moment one of the open questions of the Constitution, and in this matter Coke goes no further than to say that, whatever that jurisdiction may be, it cannot be increased by the method of proclamation. But in fact, so long as the Star Chamber continued to exist it was difficult to prevent the enforcement of proclamations by some form of penalty. When this jurisdiction had been abolished by the Long Parliament, and there remained only the regular tribunals before which it was possible to try offenders against the proclamations of the Crown, the *dicta* of Coke and his brethren came to correspond not merely with the law as it was, but with the law as it was observed, and we hear little more of this encroachment of the prerogative on the rights of Parliament.

16 Car. I, c. 10.

Illustrations of legal and illegal proclamations.

An episode of the eighteenth century furnishes an excellent illustration of the difference between legal and illegal proclamations.

When Lord Chatham and his colleagues took office in the summer of 1766 the ministers of the Crown thought themselves bound to take measures in view of the great scarcity occasioned by a bad harvest. By their advice two Royal Proclamations were issued.

Proclamation by way of admonition.

There were on the statute-book certain laws against forestallers and regraters, persons who bought up corn and kept it back to get a high price, or who carried corn from one part of the country to another in order to take advantage of better prices where the corn was scarcer. Whatever may have been the economical merit of these laws, the Crown was within its rights in proclaiming them and the penalties for the breach of them. A proclamation of these statutes was just such an admonition 'for the prevention of offences' as came within Coke's description of a legal exercise of the prerogative.

But the ministry went further. Without waiting for

the summons of Parliament they advised the King to lay an embargo, by proclamation, upon all ships laden with wheat or wheat-flour. Such a restraint was contrary to the provisions of statutes, which made the export of corn free. When Parliament met, the ministers were severely attacked for having counselled the Crown to break the law, and it is to be noted that they did not for a moment attempt to defend the legality of the proclamation. They claimed to have acted for the best on an emergency, and Lord Camden said that 'it was but a forty days' tyranny.' After acrimonious debates an Act of Indemnity was passed in favour of the ministers who had advised and the officials who had carried out the embargo.

The Forty Days' Tyranny.

The whole proceeding illustrates the difficulty which must recur from time to time, and which the Statute of Henry VIII proposed to meet. In the far greater emergency of the late war, the difficulty was met by the Defence of the Realm Act, 1914,[1] an Act almost indistinguishable in its essential features from the Statute of Proclamations. It declared that 'His Majesty in Council has power during the continuance of the present War to issue regulations as to the powers and duties of the Admiralty and Army Council, and of the members of His Majesty's Forces, and other persons acting in his behalf, for securing the public safety and the defence of the realm . . .', and provided drastic penalties for any breach of such regulations. Upon this foundation there had been erected by the end of the war a vast administrative structure, which touched and controlled the life of the individual citizen to an extent unprecedented in our history. The regulations and orders by which this was effected opened with an exordium singularly reminiscent of Henry VIII's Statute,[2] and ranged over a multitude of subjects, the connexion of which with the public safety and

The Defence of the Realm Act, 1914.

[1] 4 & 5 Geo. 5, c. 29, more commonly known by an irreverent nickname derived from the initial letters of its title.

[2] 'The ordinary avocations of life and the enjoyment of property will be interfered with as little as may be permitted by the exigencies of the measures required to be taken for securing the public safety and the defence of the Realm, and ordinary civil offences will be dealt with by the civil tribunals in the ordinary course of law.' (Regulation 1.)

the defence of the realm was not always very apparent,—from powers of internment without trial, of seizing land, buildings, or other property, of requisitioning all supplies of foodstuffs in the Kingdom, to the prohibition of the unauthorized use for personal adornment of war decorations and of the blowing of cab whistles at night in the streets of the metropolis. It is probable that many of these regulations might have been held to be beyond the powers conferred by the Act, but the nation showed itself unwilling during the crisis to fetter the discretion of the executive, and acquiesced (though, it must be admitted, with growing irritation) in much which in ordinary times it would and could have successfully challenged in the Courts.[1]

Practical difficulties of the subject.

Ordinarily the law is sufficient for all circumstances that may arise, but occasions are bound to arise when the executive must have wider powers or else act in breach of the law. The Statute of Henry VIII and the Defence of the Realm Act, 1914, solved the difficulty by giving to the Crown in Council (in the latter case for a temporary purpose only) a discretionary legislative power. The emergency of 1914 no doubt justified and even compelled a procedure of this kind, but in normal times it is safer to allow the executive to act at its peril on the chance of an indemnity,[2] and though timid ministers may shrink from risk and responsibility when action is required, we must choose between inaction which may be a source of danger, and the greater danger of placing the Crown and its ministers above the law of the land.

§ 2 (*a*). *The Dispensing Power.*

Uses of the dispensing power.

The claim of the Crown to independent legislative power was never admitted, and, when called in question, was uniformly declared illegal, but the power to dispense with the operation of statutes seems, within certain limits, to

[1] The question of the validity of the Regulations and of orders made under them nevertheless came before the Courts from time to time, and in more than one instance they were held to be *ultra vires*: see e. g. *Chester* v. *Bateson* [1920] 1 K. B. 829.

[2] It was considered advisable to pass an Act for this purpose after the war, notwithstanding the extraordinary powers that had been conferred on the Executive: Indemnity Act, 1920 (10 & 11 Geo. 5, c. 48).

have been acknowledged. It may have been of practical utility, for, as Hallam says[1], 'the language of ancient statutes was usually brief and careless, with few of those attempts to regulate prospective contingencies, which, even with our pretended modern caution, are often so imperfect; and as the sessions were never regular, sometimes interrupted for several years, there was a kind of necessity, or great convenience, in deviating occasionally from the rigour of a general prohibition.' But he adds that more often some motive of interest or partiality determined the action of the Crown; and there seems no doubt that, in the mediaeval constitution, pardons or dispensations from the observance of statutes were granted in cases which did not demand a remedy for inconvenience or hardship.

In 1347 the Commons petitioned against the grant of charters of pardon in great numbers of cases of murder, robbery, rape, and other felonies[2]; the King promised to use this prerogative henceforth for the honour and profit of the people, and to consider in Council the cases in which pardons had already been granted. In 1351 a like remonstrance was required. It is plain that pardon was given not after conviction but before indictment, and the prayer of the remonstrants was that common malefactors and murderers should be brought within the law for the quiet of the commonalty and the maintenance of the peace[3]. Modes of exercise.

Parliament endeavoured by an Act 13 Ric. II, stat. 2, c. 1 to restrain these grants by enacting that they should not be valid unless they specified the name of the offender and the precise character of the offence. The Courts of law also laid down rules limiting the dispensing power. They held that the King could not dispense with *mala in se*, which were said to be violations of common law; nor with statutes passed to prohibit *mala in se*, or in other words, to put common law into the form of a statute; nor with the rights of individuals or corporations. But the power was very hard to define, and the difficulty may perhaps be

[1] Hallam, Hist. of England, iii. 60.
[2] Rot. Par. ii. 172.
[3] Rot. Par. ii. 229.

Illustrations.

best illustrated by two cases, both decided near the end of the seventeenth century.

The case of *Thomas* v. *Sorrell*[1] was an action brought for penalties for selling wines by retail contrary to the Statute 12 Car. II, c. 25.

An Act of the reign of Edward VI had forbidden the sale of wine by retail save with licences granted in certain forms by certain authorities. James I incorporated the Vintner's Company and gave them the right to sell wine by retail or in gross in and within three miles of the City of London, and in other places, *non obstante* the Statute of Edward VI.

The Statute of Charles II, which imposed fresh penalties on the sale of wine by retail, saved the rights of the Vintners' Company, of whom the defendant Sorrell was one.

Thomas v. *Sorrell.*

The questions for the Court were, whether the patent of James I was void in its creation: if not, whether it expired when that king died; if not, whether the saving clause of 12 Charles II, c. 25 saved it from the operation of that statute: and the Court had no difficulty in deciding that the patent had not expired and that the saving clause gave it a statutory sanction if the original dispensation was valid.

To the consideration of this point Vaughan C. J. devoted much learning and ingenuity. He distinguishes a *Dispensation*, or Licence (two terms which he seems to regard as convertible), as meaning the permission to do or to abstain from doing, which legalizes what it would otherwise be unlawful to do or leave undone, from a *Pardon* which frees, after conviction, from the penalties of wrongdoing. He rejects the distinction between *mala prohibita* and *mala in se* as confusing, and rightly so, for no act is legally *malum* unless forbidden by law. He denies the power of the Crown to dispense with any general penal law, and he endeavours to define the dispensing power by limiting it to cases of individual breaches of penal statutes where no private right is infringed, and where the breach is not continuous. The forfeiture in the case before the court

[1] Vaughan, 330.

was a part of the King's inheritance. No private right was therefore affected by the dispensation granted, nor was it contrary to the intention of the Act of Edward VI, which was not that no wine should be sold, but 'only that every man should not sell wine that would, as they might when the Act was made.' So 'the King could not better answer the end of the Act, than to restrain the sellers to freemen of London[1].'

The judgement of Vaughan C. J. seems in substance to amount to this, that the King might dispense with an individual breach of a penal statute by which no man was injured, or with the continuous breach of a penal statute enacted for his exclusive benefit. We get all the learning of the time on the subject of the dispensing power, and are left with the impression that it was impossible to state the law in a clear and satisfactory form.

A more serious issue was raised by the case of *Godden* v. *Hales*[2], where the King granted a dispensation for a continuous breach of a general penal statute passed in the interest of the Church of England.

Abuse of dispensing power.

The cause of action was debt for £500. The defendant, holding a military office under the King, had neglected to take the oaths of supremacy and allegiance and to receive the sacrament according to the rites of the Church of England as required by 25 Car. II, c. 2. For this he was indicted at the Rochester assizes in March 1686 and convicted, and the plaintiff became entitled to the forfeit of £500 as by the statute was provided. Sir E. Hales set up in defence letters patent under the Great Seal, received from the King before the date of the indictment, and discharging him from satisfying all or any of the tests prescribed by 25 Car. II, c. 2.

The case was tried in the Court of King's Bench, but the opinions of all the judges were taken, and eleven out of twelve pronounced in favour of the King's right to dispense with the Act of Charles II. They did not trouble themselves with the nice distinctions discussed by Vaughan, but said boldly that the laws were the King's laws, that he

[1] Vaughan, 355. [2] 2 Shower, 475.

might dispense with them as he saw fit, that he need render no account for so doing, and that no Act of Parliament could take away that power.

Distinction between *Thomas* v. *Sorrell* and *Godden* v. *Hales*.

Whatever may be the technical difficulty of defining the King's dispensing power, there is none in distinguishing such cases as *Thomas* v. *Sorrell* and *Godden* v. *Hales*. In the one the King in the interest of trade granted a dispensation from penalties provided for his benefit; in the other the King in the interests of a religion which was not that of the nation set aside penal laws which had been passed for the security of the national religion.

Interpretation of dispensing power by the King.

There was no doubt that the King intended to put himself above the law, and, apart from all legal interpretations of the dispensing power, to set aside statutes as he pleased. He had announced to Parliament at the beginning of the session of 1685 that he proposed to employ certain persons not qualified by law to hold commissions in the army. The Commons had remonstrated, and had offered to introduce Acts of Indemnity for the benefit of such persons as the King might wish to employ and who fell under the disabilities created by 25 Car. II, c. 2, but they urged that 'the continuance of them in their employments may be taken to be a dispensing of that law without Act of Parliament, the consequence of which is of the greatest concern to the rights of all your Majesty's dutiful and loyal subjects, and to all the laws made for the security of their religion.'

The King replied with a rebuke to the Commons for their lack of confidence in him. The law was not clear, but it was evidently necessary to make it clear, and to limit the powers claimed by the King.

So thought the Parliament which passed the Bill of Rights, for the dispensing power is therein dealt with in such a way as to preclude its further exercise.

It is declared and enacted:

(1) That the pretended power of dispensing with laws, or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.

(2) In s. 12, that from and after this present session of Parliament, no dispensation by *non obstante* of or to any

statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of in such a statute, and except in such cases as shall be specially provided for by one or more bill or bills to be passed during this present session of Parliament [1].

From these clauses of the Bill of Rights one may deduce the following propositions :— Effect of the Bill of Rights.

That the dispensations granted by James II were illegal.

That there were dispensations of older date which the Bill of Rights was not intended to invalidate.

That from the date of the passing of the Bill of Rights no dispensation of any Statute or part of a Statute was to be valid unless Parliament made provision for the same in the terms of the Statute.

The words *non obstante* were merely the technical terms in which the Crown was in the habit of dispensing with statutes, and are equivalent to the words 'any article or clause in such or such a statute to the contrary notwithstanding' : and the 'bill or bills to be passed' were never brought forward.

We may therefore say that any exercise of the dispensing power subsequent to the Bill of Rights must take place by authority of Parliament [2], not by the prerogative of the Crown, and that we must go back to some considerable time before 1688 to find cases of dispensations which would be held to be lawful.

The *Case of Eton College* [3] (1815) furnishes an instance of such a dispensation. The Statutes of that College forbade the Fellows to hold any spiritual preferment in conjunction with a Fellowship in the College. Queen Elizabeth gave permission to the Fellows to hold benefices of a certain value without thereby forfeiting their Fellow-

[1] This clause was not in the original Declaration of Right, but was inserted when the Bill of Rights came to be re-enacted by Parliament, December 16, 1689.

[2] The regulations made under the Defence of the Realm Act, 1914, afford many examples of the exercise of such a power.

[3] The case is reported by Mr. Williams (1816). The substance of it may be found in Broom, *Constitutional Law*, note to Seven Bishops' case.

ships, 'any article or clause in the Statutes of our said College to the contrary notwithstanding.' It was argued that such a dispensation was saved by the words 'as it hath been assumed and exercised of late,' and that the Bill of Rights did not affect an assumption or exercise of the dispensing power which had taken place 100 years before. The Fellows were allowed to take the benefit of the dispensation of the Visitor of the College acting on the advice of his assessors, Sir W. Grant and Sir W. Scott.

§ 2 (*b*). *The Suspending Power.*

The suspending power.

The Stuarts claimed to use the dispensing power on other grounds than precedent or convenience. They claimed it because they held that the King was the source from which law emanated and possessed a discretionary prerogative which enabled him, whensoever he thought the interests of the kingdom demanded it, to vary or set aside the law of the land. On this ground had been based the decision of the Court in *Godden* v. *Hales*. In the year 1687 James II determined to act up to the estimate formed by the judges of his prerogative, to free himself from the necessity of granting dispensations in individual cases, and to suspend all the penal laws relating to religion.

The Declaration of Indulgence.

'We do declare,' runs the celebrated Declaration of Indulgence, 'that it is our royal will and pleasure, that from henceforth the execution of all and all manner of penal laws in matters ecclesiastical, for not coming to church or for not receiving the sacrament, or for any other nonconformity to the religion established, or for or by the reason of the exercise of religion in any manner whatsoever, *be immediately suspended*, and the further execution of the said penal laws, and every of them is *hereby suspended*.'

The declaration goes on to say that 'the oaths of supremacy and allegiance and also the several tests and declarations mentioned in the Acts of Parliament made in the twenty-fifth and thirtieth years of the reign of our late royal brother King Charles II shall not at any time hereafter be required to be taken declared or subscribed by any person or persons whatsoever who is or shall be employed in any office or place of trust either civil or military under us or in our government.'

The validity of the claim thus asserted came in a somewhat circuitous way before the law courts in the Seven Bishops' case. Six Bishops, together with the Archbishop of Canterbury, petitioned the King that he would not insist on the reading of this declaration by them and its distribution throughout their dioceses as had been ordered by the King in Council. For this they were tried in the Court of King's Bench as for a seditious libel, and the defence set up came to this—that the declaration of the King's intention to suspend the penal statutes respecting religion amounted to an expression of intention to break the law, and that loyal subjects might decently, and without seditious purpose, petition against the requirement that they should publish an illegal declaration.

The petition of the Seven Bishops.

Their petition alleged nothing that was false; it was not proffered with malice: if the King's action was illegal or doubtful in respect of legality the petition was not seditious. The chief justice, therefore, and the three judges instructed the jury that the only question before them was whether the legality of the declaration was so sure that to petition against it was seditious. On this point the judges were divided; two addressed themselves to the interpretation of the law, two to the furtherance of the King's wishes. Of the former Powell J. puts the matter in the clearest light:—

'If there be no such dispensing power in the King,' he says, 'then that can be no libel which they presented to the King, which says that the declaration, being founded upon such a pretended power, is illegal. Now this is a dispensation with a witness. It amounts to an abrogation and utter repeal of all the laws; for I can see no difference nor know any, in law, between the King's power to dispense with laws ecclesiastical, and his power to dispense with any other laws whatsoever. If this be once allowed of, there will need no Parliament. All the legislature will be in the King, which is a thing worth considering, and I leave the issue to God and your consciences[1].'

It might be said that there were occasions when the dispensing power could be exercised with salutary effect;

[1] 12 St. Tr. 183.

but the suspending power as claimed and used by James II was inconsistent with the very existence of a Parliament as a legislature. The Lords and Commons might meet to vote supplies, to state grievances, to criticize the ministers of the Crown, but it would be idle for them to make laws which the King could at any moment set aside. The Bill of Rights accordingly made short work of the suspending power, enacting :—

'That the pretended power of suspending of laws or the execution of laws, by regal authority, without consent of Parliament, is illegal[1].'

§ 3. *Taxation.*

The claim of the Crown to levy taxes without consent of Parliament is very closely associated with the claim to legislate independently of Parliament. For it was only by keeping a firm hold upon the sources of supply that the Commons were able to control legislation.

Nature of the discussion.

It is not proposed here to give an account of the sources of royal revenue, but of the respective claims of Crown and Parliament to demand the money of the people for the needs of government. The story of the controversy is so well told in the two great seventeenth-century cases that it is not necessary to do more than sketch the character of the dispute and then leave Bates' case and the case of Ship-money to give the history of the matter as they do nearly to its end.

Why the King could not live of his own.

The King in the fourteenth century had certain sources of income, feudal dues, crown lands, fees, fines and the like ; and the contention of the Parliaments of those days was that the King should 'live of his own.' This meant that the King had an income sufficient for the business of government, and should ask for no more. But it was not really desirable that the King should live of his own. If he had done so he would have been too great for the liberties of the country or too small for its security : he would have been so rich as to make him independent of

[1] Will. & Mary, Sess. 2, c. 2.

Parliaments or so poor as to become contemptible among his rivals abroad and his vassals at home. We might never have known parliamentary government, because the King would never have had cause to ask his people for money, or we might never have become a united kingdom, because the monarchy would have collapsed among the rival magnates or have fallen a prey to a foreign invader.

The difficulty never arose, because, in the words of Dr. Stubbs, 'no king of the race of Plantagenet ever attempted to make his expenditure tally with his ordinary income.' It would have been unfortunate either for our liberties, or for our independence and cohesion as a nation, if the kings of that race had been able or had tried to do so.

Modes of taxation.

When the King wanted money in excess of the ordinary revenue he could obtain it either by direct taxation levied on the estimated value of land and chattels, or by indirect taxation in the form of impositions upon exports and imports. Of these the first had been kept within the control of the national assembly or of Parliament by various enactments, from Magna Charta onwards, dealing with the different forms—scutages, aids, tasks and prises—which taxation of this kind assumed. It was not so easy to maintain Parliamentary control over impositions on exports and imports. The King claimed a prerogative to regulate trade, to define the privileges of alien merchants, to make agreements, apart from Parliament, with the merchants as a sub-estate or class.

Direct aids and prises.

Indirect imposition on merchandise.

After a long struggle the Commons in 1340[1] obtained the passing of a statute, not wholly satisfactory in its terms, limiting the King to a fixed charge on wool, and on other things to the ancient customs, unless Parliament granted more. In 1371[2] they carried a statute which closed the controversy as to wool, and from 1373[3] they regularly granted customs on wine and merchandise for a term of years or for the life of the King, under the name of tunnage and poundage.

The claim of the Crown to levy impositions in addition

[1] 14 Ed. III, st. 2, c. 4. [2] 45 Ed. III, c. 4.
[3] Stubbs, Const. Hist. ii. (5th ed.) 557.

Impositions.

to the customs thus granted was not raised for nearly two hundred years. But in 1557 Mary laid a duty on cloths exported and another on French wines imported. Elizabeth laid a duty on sweet wines, and these continued to be raised throughout her reign.

Indirect Taxation. The Case of Impositions.

James determined to derive a substantial revenue from impositions of this nature. He began by the publication of letters patent increasing the duty on tobacco from 2*d.* to 6*s.* 10*d.* a pound, and on currants from 2*s.* 6*d.* to 7*s.* 6*d.*

The case of Bates.

Bates, a Turkey merchant, refused to pay the additional impost, and the Attorney-General took proceedings against him in the Court of Exchequer. Bates set up the statute granting 2*s.* 6*d.*, and averred that he had paid all that the law required him to pay. Judgement was given against him mainly on the ground that trade was matter of general policy falling within the discretion of the King. The King's power was said by the Court to be double, ordinary and absolute. The ordinary power seems in the view of the Court to have been concerned with administration of known existing law; the larger and more indefinite power related to the determination of policy, and could not be limited by statute or common law. The right to control trade was put on a level with the right to protect merchants from foreign oppression and to declare war if such oppression should continue.

2 St. Tr. 371.

No one at the time seems to have regarded the decision as erroneous or corrupt: but it enabled the King to raise the duties upon all kinds of merchandise. Bates' case was decided in 1606; a great increase on duties was made by a book of rates published in 1608, but it was not until 1610 that the Commons took up the matter, and we get the learned argument of Mr. Hakewill in support of a remonstrance against impositions to be presented by the House to the King [1]. The argument falls into three divisions; the first is directed to showing that by the analogies of the Common Law the Crown did not possess the right which

The protest of the Commons.

Hakewill's argument.

[1] For Hakewill's argument, see State Trials, vol. ii, p. 407.

it claimed; the second shows that the claim has been resisted whenever made; the third enumerates the statutes which preclude the Crown from levying impositions. In conclusion he deals with the reasons assigned by the Court of Exchequer *seriatim*.

Argument from Common Law.

The argument drawn from the Common Law is twofold. It is laid down as a general proposition that the customs, so far as they are not settled by statute, are a part of the common-law rights of the King, and that these are all either certain in amount or reducible to certainty, whereas the claim now set up is a claim to levy arbitrarily such sums as it may be the pleasure of the King to demand.

Then it was alleged that for every source of royal expense there is a corresponding source of supply: for the administration of justice, the fines and fees of the Courts; for security of trade, the statutory duties; for offensive or defensive war, the obligations of military service. If these did not suffice, the King could ask Parliament for more.

Argument from history.

The historical argument which forms the second part of Hakewill's speech is not quite satisfactory. He states that from the Conquest to the reign of Mary not six cases could be found of impositions levied as James proposed to levy them. He defines impositions of this sort as 'an increase of custom at the King's pleasure, commanded by him to be taken, the passage being free and open to all men,' and he distinguishes such impositions from other modes of raising money from merchants to which kings had resorted from time to time [1]. He is successful in showing that the cases he cites had never passed without remonstrance by the Commons, and that from the death of Edward III to

[1] Of these modes of raising money *dispensations* to export goods of which the export was forbidden by Statute were regarded with jealousy by the Commons, and efforts were made to prevent such dispensations by 27 Ed. III, st. 2, c. 7 and 36 Ed. III, c. 11. Of *impositions by Ordinance*, Hakewill gives but one instance, and then the Ordinance was revoked as soon as made. The *forced loans* were lawful if '*bona fide* borrowed and truly intended to be repaid'. The *negotiations with the merchant class* were resisted and finally stopped by the Commons; see Rot. Parl. ii. 229, 25 Ed. III. The Commons petition against a grant made by the merchants, on the ground that the people will ultimately pay the sum granted in the increased prices which the merchants will be compelled to charge.

the accession of Mary no such duties had been imposed. His statements as to the impositions levied by Mary and Elizabeth are not perfectly clear, nor does he tell the whole story. It is certain that both these queens imposed duties, that throughout their reigns duties were paid on exported cloth and imported wine, and that no question was raised in Parliament concerning them [1].

Argument from statute.

The third chapter of the argument consists in a recital of the statutes which Hakewill held to be conclusive against the claim of the Crown, and here again it is hard to admit that they meet the case. The statutes cited are not later than 14 Edward III, and every one of them is open to the construction that it deals with taxation of a different character, or with specific and not with general imports on merchandise. Hakewill's common law argument rests on analogy not on authority; his argument from statute is inconclusive, and his historical argument breaks down. And yet, though the decision of the judges was difficult to contest, it is impossible not to feel that the right of the matter was with Hakewill.

Difficulties in the way of the argument.

The whole of the discussion is a good illustration of the form which constitutional difficulties took in the time of the Stuarts. Neither precedent nor statute was conclusive; each disputant thought he had the law on his side, and each had in fact an arguable case; for statutes and precedents were applied to circumstances which they were never designed to meet. Difficulties had arisen between the Plantagenet kings and the Commons as to the right of the King to tax and levy impositions; these had been met from time to time in different ways. Sometimes the King conceded the point immediately at issue; sometimes a compromise was effected; sometimes a statute provided for the circumstances of the case. When similar difficulties arose two hundred and fifty years later, both parties appealed to ancient precedents and statutes which were not only difficult of application in themselves, but which had been overgrown by the practice of the Tudor queens. We, who look at the question from further off, can see that the statutes and

[1] Hallam, History, i. 317.

precedents of the fourteenth century, if they meant anything, meant that the King should not raise money without consent of Parliament, that the door had been closed to direct taxation and the imposition of export duties, and that the express Parliamentary grants of tunnage and poundage, for a term of years or for life, showed the intention of the Commons and of the Crown, until Mary's time, to treat import duties as being in no way different from other modes of raising money. The decision in Bates' case violated the spirit of the constitution rather than the letter of the law.

Impositions last till 1640.

Hakewill's argument led to a remonstrance by the Commons, and this to a reduction of impositions for a while, but the Crown continued to use them as a source of revenue. They were not touched by the Petition of Right, which spoke only of 'gift, loan, benevolence, or other suchlike charge,' but they were dealt with by the Long Parliament.

In the Act of 1640, which granted the King tunnage and poundage for that year, punishments were provided for any officer who should levy such customs without Parliamentary grant, and it was further 'declared and enacted that it is and hath been the ancient right of the subjects of this realm that no subsidy, custom, impost, or other charge whatsoever ought or may be laid or imposed upon any merchandise exported or imported by subjects, denizens, or aliens, without common consent in Parliament [1].'

Direct Taxation. The Case of Shipmoney.

The case of Hampden.

The form which this mode of taxation took was a writ under the Great Seal addressed to the Sheriff of each county, demanding for the King's service a ship or ships of a specified tonnage to be sent—fitted, manned, and victualled—to Portsmouth on a certain day [2]. The cost was to be assessed for the county and some of its boroughs by the sheriff; for other boroughs by the mayor or bailiff. Hampden's share of the contribution demanded from the county of Bucks was £1. He refused to pay it, and was

[1] 16 Car. I, c. 8, s. 1.

[2] The first writ of Shipmoney (1634) was addressed to maritime towns, the second (1635) and the third (1636) were sent to the whole kingdom.

summoned to show cause in the Court of Exchequer in Trinity Term of the 13th Charles I [1].

The counsel for Hampden followed the same line of argument as was adopted in the Parliamentary discussion on the case of Impositions.

Argument from Common Law;

The provision made by the law for the defence of the country by sea was the grant to the King of tunnage and poundage, and the service of the Cinque Ports. To this provision the right assumed by the Crown of levying impositions had added considerably. If more was wanted Parliamentary supply was the only legal source.

from history;

Precedents were producible on both sides; of cases where the King had raised money or troops on an emergency, and of cases where he had borrowed or begged money for a special purpose, or had deferred the raising of money till a Parliament could meet.

from statute.

Statutes were conclusive in this case against the claim of the Crown, from Magna Charta to the Petition of Right. In fact it was unnecessary to go beyond the Petition of Right passed nine years before, wherein, reciting Magna Charta and the Statute de Tallagio non Concedendo, it was prayed by the Houses and granted by the King that 'no man hereafter be compelled to make or yield any gift, loan, benevolence, tax or such like charge, without common consent by Act of Parliament [2].'

Admission of executive power of the Crown,

St. John, one of Hampden's counsel, made in his argument some bold admissions: he declined to draw any distinction between inland and maritime counties in respect of their liability for coast defence. He further admitted that the King was entrusted with the defence of the country, and was judge of the best means for securing that defence. He concedes to the Crown 'that as the care and provision of the law of England extends in the first place to foreign defence; and secondly, lays the burden upon all; and for aught I have to say against it, it maketh the quantity of each man's estate the rule whereby this burden is to be equally proportioned upon each person; so likewise hath it, in the third place, made his Majesty sole judge of dangers from foreigners and when and how the same are to be

[1] 3 State Trials, 825.

[2] 3 Car. I, c. 1, s. 10.

prevented; and to come nearer, hath given him power by writ under the Great Seal of England, to command the inhabitants of each county to provide shipping for the defence of the kingdom, and may by law compel the doing thereof.'

Its limitation by Parliament.

This was to admit a great deal. But St. John goes on to show that while the King was judge of the policy to be pursued in meeting dangers, Parliament was the proper instrument by which supplies were to be obtained. The only ground for dispensing with a Parliamentary grant and resorting to arbitrary taxation would be the imminence of danger, and Hampden's counsel had no difficulty in showing not only that no danger was imminent, but that no such imminent danger was alleged in the writ.

Decision that *Rex* is *Lex*.

The judges, by a majority of seven to five, decided in favour of the Crown, some, as Finch and Weston, on the ground that the King was constrained or might be constrained by the necessities of the defence of the kingdom to raise money without waiting for a Parliament; others, alleging the superiority of the King to the law. The opinion of these last may be taken in the words of Berkeley, 'the law is of itself an old and trusty servant of the King's: it is his instrument or means which he useth to govern his people by. I never read nor heard that *Lex* was *Rex*, but it is common and most true that *Rex* is *Lex*, for he is *Lex loquens*, a living, a speaking, an acting law [1].'

In this matter of taxation, as fifty years afterwards in the case of the dispensing power, judges were found to maintain that for taking the subject's money Acts of Parliament were unnecessary, as later that for imposing general rules of conduct, Acts of Parliament were precarious; for the King, the source of all law, might if he chose do without them or set them aside.

The Long Parliament, by Statute 16 Car. I, c. 14, declared the judgement in the case of shipmoney to be contrary to law, and enacted the observance of the provisions of the Petition of Right, and the Bill of Rights enacts—

'That the levying money for or to the use of the Crown

[1] State Trials, iii. 1098.

by pretence of prerogative, without grant of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal [1].'

Parliament, which is omnipotent, may, if it so chooses, delegate to the executive any of its powers, but the Courts in construing a statute will not admit an interpretation which would derogate from the Bill of Rights, unless the intention to do so is expressed in the clearest possible words. Even the extraordinary powers conferred on the executive by the Defence of the Realm Act, 1914, were held to be insufficient for this purpose.[2] 'It is true,' said the Court of Appeal, 'that the fear in 1689 was that the King by his prerogative would claim money; but excessive claims by the executive government without grant of Parliament are at the present time quite as dangerous and require as careful consideration and restriction from courts of justice [3].'

Purveyance. The Case of Requisition.

The right of purveyance.

Analogous to the claim to impose taxation, direct or indirect, was the right of purveyance. According to Blackstone [4], 'the profitable prerogative of purveyance and preemption was a right enjoyed by the Crown of buying up provisions and other necessaries by the intervention of the King's purveyors for the use of the royal household at an appraised valuation in preference to all others, and even without consent of the owner; and also of forcibly impressing the carriages and horses of the subject to do the King's business on the public roads in the conveyance of timber, baggage and the like, however inconvenient to the proprietor, upon paying him a settled price'. Of the same kind was the right claimed by the Crown to enter upon the lands of a subject and dig for saltpetre wherewith to make gunpowder, a right recognized by the judges in the *Case of Saltpetre* [5].

[1] 1 Will. & Mary, st. 2, c. 2.

[2] *Att.-Gen.* v. *Wilts United Dairies*, 37 T. L. R. 884. The Food Controller in this case had demanded a sum of money as the condition of the grant of a licence for the sale of milk in pursuance of a scheme, meritorious in itself, for equalizing the distribution of milk through the country during the War.

[3] *Ibid.*, *per* Scrutton, L. J. at p. 886.

[4] Comm. i. 287.

[5] 2 Co. Rep. 12.

The right of purveyance was a fertile source of dispute between Crown and Commons, and was finally abolished by statute in 1660 [1]. But, as Blackstone's account shows, the obligation to pay for goods purveyed had been generally recognized [2], and it was not until the twentieth century that a prerogative right was boldly asserted to seize and occupy the lands of a subject if required for the defence of the realm without any obligation to pay compensation to the owner, save as an act of grace. The House of Lords rejected this claim of the Crown [3]. Even if a prerogative right of so extended a nature had ever existed (and an examination of the records appeared to be conclusive against it), a series of statutes [4] had provided machinery whereby the Crown was enabled to take possession of such lands as might be necessary for the purpose of national defence—if need be, by compulsion, but always on payment of compensation. This being so—

Att.-Gen. v. *De Keyser's Hotel.*

'The constitutional principle is that when the power of the executive to interfere with the property or liberty of subjects has been placed under Parliamentary control and directly regulated by statute, the executive no longer derives its authority from the royal prerogative of the Crown, but from Parliament, and that in exercising such authority the executive is bound to observe the restrictions which Parliament has imposed in favour of the subject. . . . It would be an untenable proposition to suggest that courts of law could disregard the protective restrictions imposed by statute law where they are applicable. In this respect the sovereignty of Parliament is supreme [5].'

Prerogative powers once curtailed by a statute (and the Crown is an assenting party to every statute) can never thereafter be exercised save within the limits which the statute itself prescribes [6].

[1] 12 Car. 2, c. 24, s. 11. [2] Stubbs, Const. Hist. ii. (3rd ed.) 564.

[3] *Att.-Gen.* v. *De Keyser's Hotel* [1920] A. C. 508. An account of this case, fully documented and with an historical introduction in which all the authorities are reviewed, is given in Mr. Leslie Scott's book, The Case of Requisition. Mr. Scott was one of the counsel for the suppliants.

[4] Defence Act, 1842 (5 & 6 Vict. c. 94) and subsequent Acts.

[5] *Per* Lord Parmoor in *Att.-Gen.* v. *De Keyser's Hotel*, *supra*, at pp. 575–6.

[6] See The Case of Requisition, ch. v; and for a discussion of other cases in which the right to requisition has been asserted by the Crown or conferred

Practical difficulties of the question.

It is noticeable that throughout the controversies between Crown and Parliament in the seventeenth century the same difficulty recurs and presents itself under different aspects, to such of the parties as were not wholly engrossed in the technicalities of the discussion.

There must be some person or body in the State capable of acting promptly in cases of emergency. A Parliament if not sitting has to be called, and is at best an unwieldy body for the purpose of dealing with present and pressing difficulties.

In the seventeenth century the choice lay between the submission of such difficulties, as they arose, to Parliament, and the assignment of great and dangerous power to the Crown. And apart from the danger to liberty of entrusting the Crown with the powers claimed for it by its advocates there was a practical inconvenience. If a king, animated with the best intentions, persistently blundered in the exercise of his discretion, there was no remedy short of a revolution.

Our cabinet system is the solution of the puzzle of the seventeenth century: we fix responsibility upon a group of ministers who can be removed if they fail; we do not fear lest they should threaten our liberties, and at the same time we expect that the servants of the Crown and the nation will not shrink from responsibility if occasion should arise when action must be taken without waiting to secure the acquiescence of Parliament.

§ 4. *Influence of the Executive on the Legislature.*

Influence of executive on legislature.

In the previous sections of this chapter we have described attempts made by the Crown to resume those functions in the State which had once belonged to the Crown in Council before Parliament grew up alongside the older institution, before the executive and legislature had become distinct bodies with appropriate duties. But we must not leave this part of the subject without noting other modes by which

by Statute, see the same work, Excursus I. The right of requisitioning ships is considered at length by Prof. Holdsworth in the Law Quarterly Review, xxxv. 12.

the executive has endeavoured to control the legislature, not by interfering with its duties but by influencing its action.

Influence of the Crown upon the Commons.

So soon as the rights of Parliament in respect of taxation and legislation became clear and definite the King and his ministers began to consider how far their wishes could be effected by the instrumentality of Parliament, and in particular of the Commons.

Dealings with the constitution of the House;

The modes adopted in view of this end may be said to have passed through three stages. The Tudors attempted to obtain a subservient House of Commons by the creation of constituencies and the management of elections. The first Stuarts, with the exception of the attempt of James to form a Court party in Parliament, tried methods more in accord with their high notions of prerogative and their contempt for constitutional forms. They influenced debate, so far as they tried to influence it, by interference with freedom of speech; but they preferred to dispense with Parliamentary forms and to fall back on the independent action of the Crown described in the earlier sections of this chapter. The third stage commences with the Restoration: the King could no longer venture to create new constituencies nor to interfere directly with freedom of speech in Parliament; he addressed himself to the corruption of individual members, by places, by pensions, and by bribery. After the Revolution this method became more frequent and systematic as the House of Commons increased in power with no corresponding increase in responsibility. The art of Parliamentary management, as we shall have to note shortly, attained its perfection in the fifty years preceding the concession of independence to the American Colonies.

with freedom of speech,

with integrity of members.

The influence exercised by the Tudor sovereigns upon the House of Commons was of two kinds, the creation or restoration of constituencies designed to be under the influence of the Crown, and instructions general or special addressed to the sheriffs or to electors conveying recommendations or commands about the elections.

Creation of boroughs.

The additions made by Henry VIII to the representation of the country are free from the suspicion of any sinister motive. One cannot say the same of the twenty-two new members added in the reign of Edward VI. Fourteen of these were returned by seven Cornish boroughs, and from the number of persons represented and the qualifications of the electors in the year 1816 it may be concluded that with all due allowance for changes in the fortunes of these boroughs they never were expected to be free from external influences. The constituencies were as follows :—

Bossiney, mayor and freemen chosen by the mayor	9
Newport, burgage tenants paying scot and lot	62
Westlooe, corporation, consisting of twelve persons who need not reside	12
Grampound, mayor, recorder, aldermen and freemen	42
Saltash, mayor and free burgesses	38
St. Michael's, portreeve, lord of the manor and inhabitants paying scot and lot	18
Camelford, corporation being inhabitant householders paying scot and lot	9

Mary added or revived fourteen boroughs, Elizabeth, thirty-one [1]. The clear intention of these additions was to form a court party in the House of Commons, and to obtain seats for men who held places or expected favours of the Crown and who would vote as they were told if constituencies were made or found for them.

Interference with elections.

The creation of new boroughs, or the revival of old ones, would not, however, have been of much use if the Court had not taken active steps to fill them with suitable representatives. This was done either by general directions to the returning officers for the election of members of a certain character, or by express recommendations of individuals.

Instructions to sheriffs.

A circular addressed to the sheriffs in 1553 is an illustration of both forms of interference. It bids the sheriffs give notice to the electors that they should, in the first instance,

[1] Of the boroughs added by Mary ten were newly enfranchised, of those added by Elizabeth twenty-five. About this time members habitually ceased to press for their wages, and this among other reasons inclined boroughs which had ceased to return members to ask for a revival of their privileges.

choose residents of knowledge and experience, but that, if the Privy Council should make special recommendation of men of learning and wisdom, such direction should be regarded.

Nominations.

This interference with elections by the Privy Council or by ministers of the Crown or noblemen did not pass unnoticed by the Commons. The nomination of courtiers or placemen was almost certain to prove inconsistent with the statute of Henry V, which made residence a qualification for election. Accordingly in 1571 a bill was brought in to make valid the election of non-residents. The supporters of the bill argued that it would give to every constituency the choice of the best available candidates, and thus was raised the question whether a member represented the general interests of the whole kingdom or the local interests of those who returned him. The opponents of the bill did not rest their opposition on the fear that local interests might suffer; they urged the risk of such interference with the representation as we have been discussing, the probability that candidates would be nominated by noblemen and courtiers and that 'lords' letters would bear sway [1].' The bill was read a second time and committed, but was then dropped.

Additions of James I to constituencies:

The wholesale creation of constituencies ceased with the accession of James I. The additions made in his reign to the representation were mostly by way of revival of constituencies which had ceased to return members, and were the result of the action of the House of Commons ordering a warrant for the issue of a writ. An illustration is afforded by the cases of Pontefract and Ilchester in the year 1620, as to which the following entry appears in the Commons' Journals of the report of the Committee of Privileges [2]:—

revivals of electoral rights.

'For Pomfrett that 26 Ed. I it sent burgesses; which continued a good while after. That by reason of the barons war it grew poor. That 10 & 11 Hen. VI, a return made, they could not send burgesses by reason of poverty.

That 4th Jac. the king granted them all their former liberties and customs.

[1] D'Ewes, Journal, 168.

[2] Com. Journ. i. 576.

That the Committee thinketh it to stand both with law and justice that a writ should go for choice of burgesses.

For Ilchester :—till Hen. V time sent burgesses. Upon question, Pomfrett to send burgesses. Upon like question, Ilchester to send burgesses, and writs for both.'

This shows that the right of sending members to Parliament began to be prized as the Commons grew more independent and the general interest in politics more keen, and serves to explain how it was that the Stuart kings first had recourse to other measures for influencing Parliament. By the advice of Bacon, James I endeavoured to form a Court party in the House, not merely of placemen or nominated members, but of aspirants for Court favour, who might influence the temper of the Commons in the King's interests. These persons were called 'Undertakers.' Such a group of members, professing to form a channel of communication between Crown and Commons, came into existence again in the time of Charles II, and reappears under somewhat different conditions in the 'King's friends' of George III.

The Undertakers.

But attempts to influence the House of Commons were not very congenial to kings who maintained, as James maintained, that the privileges of the House were 'derived from the grace and permission of his ancestors and himself' and might be 'retrenched' at his pleasure: or who, like Charles I, could, through the mouth of his ministers, threaten the House that if they trenched on his prerogatives they might 'bring him out of love with Parliaments [1].'

Interference with freedom of debate, such as has been spoken of under the head of Parliamentary privilege, and invasion of the province of Parliament by independent legislation and taxation, were the rough methods employed by Charles, and it is not until after the Restoration that we find a revival of attempts to influence members.

Parliamentary management after Restoration.

Charles II ventured only upon one addition to the constituencies, that of Newark, by royal charter, an exercise of the prerogative which did not pass unquestioned by the Commons [2], during his reign. The forfeiture and re-modelling

[1] Gardiner, Hist. of England, (1884), vi. 110.

[2] Com. Journ. ix. 403. The city and county of Durham were enfranchised by 25 Car. II, c. 9.

of the borough charters at the end of the reign of Charles II and at the commencement of the reign of James II is the last form of violent external measures used by the King to affect the representation. The ill success of the attempts of James II to dispense with the forms of the constitution made it clear that, if the House of Commons was to be managed in the interest of the Crown and of the ministers of the Crown, this must be done otherwise than by tampering with the representation of the country in Parliament, or by interference with freedom of debate.

Increased difficulties of executive.

After the Revolution the House of Commons, from causes we have noted, had become the chief power in the State. In order to carry on the business of government it was necessary that the ministers of the Crown should have the continuous support of a majority of that House. But such continuous support was not easy to secure. Throughout the reigns of William and of Anne party spirit was, on the whole, sufficiently vehement to supply to some extent the want of party discipline. Yet the corruption of members by places and bribes was common, and the management of elections through the returning officers was an important object of ministerial care [1].

Systematic corruption of Parliament in 18th century.

But it was not till after the accession of the Hanoverian kings that Parliamentary management became a system under the hands of Walpole. He realized to the full the importance of a working majority in the Commons, and the difficulty of keeping it together.

The difficulty was serious. The engrossing political issues of the seventeenth century were in a great measure laid to rest, and there was not excitement enough in politics to create genuine party divisions. The House debated with closed doors, and its members were free from external criticism. The constituencies often were so small, so inert, or so corrupt as to care little what their members said or

[1] In the Wentworth Correspondence, p. 135, the defeat of the Whigs in 1710 is attributed to an electioneering blunder. They had thought there would be no election till the next year, 'so had directed her Majesty's choice of sheriffs, almost throughout England, of Tories; their friends they kept off till next year, *when they thought they should have use of them in the elections of Parliament men.*'

did. In the absence of any external control over the conduct of members, and of any real political interests or issues to keep parties together, in the demoralization of politics, which was partly due to the moral collapse of the Restoration, partly to the risks and uncertainties of political life during the past forty years, it was not easy for Walpole to get a majority to support his ministry out of mere public spirit. Nor did he try to do so. He accepted the condition of public morality. He kept his majority together by the simple process of bargain and sale. But that which had been done intermittently during previous reigns, he did in a businesslike and systematic way. Bribery is not easily proved where it is to the interest of all parties concerned to keep the secret ; but Walpole's hints to his successor, Henry Pelham, as to the best mode of keeping together the rank and file of the party, are quite sufficient to indicate the mode in which the House of Commons was 'managed' between the years 1721 and 1742.[1] The process of management continued under Henry Pelham and his brother, the Duke of Newcastle, until George III took into his own hands the business of corruption. To trace the gradual emancipation of the House of Commons from such influences would be to write the political history of England from the death of Henry Pelham to the Reform Bill of 1832.

How it was possible.

How it came to cease.

The elder William Pitt was the first to prove to the political managers of the eighteenth century that there was a public outside the constituencies capable of taking a generous interest in political matters. The members of the Whig party who grouped themselves under the leadership of Lord Rockingham did something to show that common opinions on the conduct of affairs of state may bind a party together as well as ties of relationship or the prospect of mutual gain. One antidote for the political corruption of the eighteenth century was to be found in the growth of genuine political interests throughout the country. Such interests would diminish the necessity for giving bribes and the inclination to receive them : but publicity of debate and reform of the representative system could alone furnish

[1] Coxe's Pelham, i. 93.

a real security that members of the House of Commons would attend to the interests of their country rather than to their own. When members become responsible to popular constituencies, and when the constituencies have the means of knowing what their members say, and how they vote, a minister can only hope to obtain precarious and occasional support by offering personal advantages to individuals. But we need not carry this matter further. Nevertheless it is necessary to speak shortly of the various inducements offered to members, and the process by which Parliamentary management was effected.

Modes of influencing members.

Offices and pensions.

With official disqualifications we have already dealt in describing the persons who may be elected to serve in the House of Commons; but historically such disqualifications fall into two groups. Those created during the greater part of the eighteenth century were designed to secure the independence of Parliament: the more modern disqualifications are for the most part imposed to secure the undivided attention of officials to the business of their departments, and the advantage of a permanent civil service unaffected by changes of ministry or by considerations of party politics.

The legislation which had specially in view the elimination from the House of Commons of persons whose votes would be at the disposal of the King and his ministers extends from the close of the seventeenth century to the reforms initiated by Burke in 1782.

The amount of influence accruing to the Crown from the places which were thus abolished, or made to disqualify, may be collected from Burke's speech on Economical Reform, made in support of the Civil List Act of 1782. It is not difficult to see the use to which such places were put when the reform of the king's household was thwarted because 'the turnspit in the king's kitchen was a member of Parliament'; when the Board of Trade could be described as 'a sort of temperate bed of influence: a sort of gently ripening hot-house where eight members of Parliament receive salaries of a thousand a year, for a certain given

time, in order to mature, at a proper season, a claim to two thousand granted for doing less, and on the credit of having toiled so long in that inferior laborious department.'

Government contracts.

Another form of corruption, applied chiefly to commercial members, was the grant of a government contract, such as to supply the navy with beef or the army with cloth.

Such a contract was given, not for the advantage of the branch of the service to be supplied, but with a view to the parliamentary support of the contractor. The service was ill supplied. The constituents did not obtain the unbiassed attention of their member to local or national interests, and everybody was injured by the transaction, except the member who made money out of the contract, and the minister who secured the member's vote [1].

This practice was brought to an end by the disqualification of holders of government contracts by 22 Geo. III, c. 45.

Shares in loans.

A more expensive form of corruption was practised in the latter part of the eighteenth century, during the ministries of Bute, Grafton, and North. It consisted in assigning to friends and supporters of the minister shares in government loans and lotteries. By this means the country was made to borrow money on terms considerably above the market price, and, in the case of a loan brought out by Lord North, sustained a loss of nearly a million upon the transaction. The practice was abandoned by Pitt, who, from the time that he became minister in 1784, when he wanted to raise money by loan, invited offers which were sent to him sealed by the persons who desired to take up the loan. These tenders were opened in the presence of those who had made them, and the best offer was taken [2].

Payment for votes.

But these modes of influence were occasional and unsystematic as compared with the direct method of bribery which prevailed from the reign of Charles II to the end of the ministry of Lord North in 1782.

Much has been said and many authorities cited as to the corruption of Parliaments between these periods. Its preva-

[1] Parl. Hist. xx. 123–129, and xxi. 1333 and 1365.

[2] See May, Constitutional History, vol. i. 325, and the authorities there cited.

lence during the reigns of Charles II and William III is attested by Burnet [1] and affirmed by Macaulay [2]. Individual cases of the receipt of money by members of either House in consideration of support given to ministers are instanced by Sir E. May [3]. But the systematic maintenance of a ministerial majority by the regular payment of bribes seems to have been the invention of Walpole. The evidence is scanty, but there is significance in Walpole's advice to Henry Pelham, advice given by a man who had retired from office to the man whom he desired to succeed him in power. 'I think it needless to suggest to you the necessity of forming within yourselves your own scheme. *You must be understood by those you are to depend upon, and if it is possible they must be induced to keep their own secret* [4].' Such advice explains the requirement of leaders of the House of Commons, when the Prime Minister was a member of the House of Lords, that they should be 'authorized to talk to members of the House of Commons on their several claims and pretensions.' It explains also the fluctuations in the expenditure of the secret service money in correspondence with the Parliamentary needs of government.

The system of Walpole;

George III, who liked to be his own minister, paid great attention to this department of ministerial duty. His correspondence with Lord North, particularly at the time when that minister was about to retire, affords abundant illustration of the use made of the secret service money and of the King's savings out of the civil list, to corrupt members and constituencies.

of George III.

Thus in 1782 the King writes [5]: 'I must express my astonishment at the quarterly accounts of the secret service being only made up to the 5th of April, 1780. No business ought ever to be the excuse for not doing that.'

'I shall make out the list paid by Mr. Robinson to Peers, and shall give it to the First Lord of the Treasury: but I cannot answer whether under the idea of influence there

Payments to members of Lords and Commons.

[1] Hist. of his Own Time, ii. 144.
[2] Hist. of England, iii. 541.
[3] Constitutional Hist. of England, i. 312.
[4] Coxe's Pelham, 193.
[5] Correspondence of George III with Lord North, vol. ii. 421–5.

will not be a refusal to continue them. Those to members of the House of Commons cannot be given ; they may apply if they please to Lord Rockingham, but by what he has said I have not the smallest doubt he will refuse to bring their applications as well as those of any new solicitors in that House.'

Lord North apologizes for the delay ' with a heart full of the deepest affliction.'

' The secret service list was always ready after every quarter, so that no delay is imputable to him. Mr. Robinson, *whose list is of a nicer nature,* never omitted entering every sum he paid the moment he paid it, so that every article of his account is kept in perfect order.'

It would seem from this that such members of either House as desired to be retained in the service of the ministry made application to the minister, that he communicated their wishes to the King, received authority to expend the necessary sums of money, made the payments, and accounted for them in a book which should have been sent quarterly to the King.

The allusion to Mr. Robinson's list as being ' of a nicer nature,' suggests that the purchase of a Peer's vote and influence involved more delicacy and secrecy than was needed in dealing with a Commoner.

Other forms of corruption are disclosed in this winding up of business between the King and North. No other minister was so completely in accord with George III as to the methods of politics, and to this we probably owe the frank disclosures in their correspondence.

Pensions. Secret pensions were paid to members in breach of the law ; and in prospect of the advent to office of a minister who would not connive at such proceedings, these pensions were set down in the names of the wives of such as were married. Poor George Selwyn, who was a bachelor, had to forgo his pension altogether. ' He must look to better days,' said the King.

Bribery at elections. But the most serious item of expenditure revealed in this part of the correspondence was the outlay in bribery at elections. ' If Lord North remembers correctly, the last

general election cost near £50,000 to the Crown, beyond which expense there was a pension of £1,000 a year to Lord Montacute and £500 a year to Mr. Selwyn for their interest at Midhurst and Ludgershall.' On bye-elections alone the King had spent £13,000 in three years. But Lord North says of the members who were assisted to come into Parliament that 'they all behaved with very steady attachment to the end.'

Removal of opponents from Commissions.

A cheaper mode of securing the support of members who held commissions in the army and navy was to deprive them of their commissions if they voted against the government. Allusion has already been made to this infringement of the privilege of freedom of debate, which was, as Burke says, discountenanced and altogether abolished in Lord Rockingham's short administration in 1765.

Honours and dignities.

Besides these grosser forms of corruption, and in substitution for them as direct bribery and intimidation of members ceased, honours and dignities were held out as inducements to rich men or large landowners to support the government. At a time when many boroughs were, so far as representation went, articles of property, the votes which an owner of boroughs could command might be placed at the disposal of a minister in consideration of a peerage, or an advancement of rank in the peerage. By this means Pitt, between the years 1784 and 1801, was able not merely to strengthen his position in the House of Commons, but to change in great measure the political colour of the House of Lords, by the creation or promotion of 140 peers.[1]

Purchase or corruption of constituencies.

Purchase of boroughs.

All these modes of influencing members of the House of Commons were rendered possible only by the condition of the representation. The counties were independent, but were not likely to look beyond the county families, and the cost of a contest was enormous. In many boroughs there were no electors capable of expressing an opinion; where

[1] Yet the demand far outstripped the supply. Lord Grey informed Creevey that the applications made to him for peerages had been over three hundred. Creevey to Miss Ord, Nov. 9, 1834; Creevey Papers, 636.

there was such an electorate its opinion was often determinable at a known price. Thus a seat in Parliament for a borough was in most cases a matter of bargain and sale; only in some cases the seat was purchaseable without any reference to electors, in other cases the electors made their own terms. The two parties in the state competed with one another for the possession of such seats as were to be bought out and out, and a man who wished to get into the House of Commons, and who had no such local interest as would procure his election for a county, could not easily obtain a seat except as nominee of the government or of the opposition, or by the favour of an owner of boroughs, or by purchasing a seat for himself.

Bribery of constituents.

The ministers had resources which enabled them to compete successfully with other purchasers of seats, and the domestic economy of George III was, as appears above, not without reference to electioneering interests. But we are not here concerned with the defects of the representative system before 1832 [1], except in so far as they rendered the House of Commons susceptible to the influence of the Crown and its ministers.

The great change in this respect dates from the Reform Bill of 1832. The modern constituency exercises a far more potent control over the actions of its member than royal or ministerial influence. The independence of members, in so far as it is restricted at the present time, is restricted by the party organization which dominates the constituencies, and the party whip who constrains the member to vote as the party organization has determined.

Influence of the Crown upon the Lords.

So far we have spoken chiefly of the influence of the Crown on the House of Commons. Its influence on the House of Lords has been of two kinds. Firstly, the Lords are from their position and mode of life more easily affected by any expression of the personal wishes of the Crown. On two notable occasions such an expression of the royal wishes has

(1) Expression of royal wishes.

[1] Curwen's Act, 49 Geo. III, c. 118, forbade the public sale of seats, but the law was evaded. May, Const. Hist. i. 293.

determined the action of the House of Lords on an important question.

In case of Fox's India Bill;

When, in December 1783, Fox's India Bill had passed the Commons, and was under discussion in the House of Lords, George III had an interview with Lord Temple, afterwards Marquis of Buckingham, and empowered Temple to say that, 'whoever voted for the India Bill was not only not his friend, but would be considered by him as his enemy; and if these words were not strong enough, Earl Temple might use whatever words he might deem stronger and more to the purpose.'

This statement was written out in the King's own hand. It was shown by Temple to peers who were wavering in their opinion of the merits of the bill, and to peers who were apt to be guided in their political conduct by an intimation of the King's wishes. The result was that the bill was thrown out on a motion that it should be committed.

of Lord Grey's Reform Bill;

A like influence was brought to bear upon the House of Lords in order to bring about the passing of the Reform Bill of 1832. The first Reform Bill had failed on an adverse resolution, carried as a preliminary to its being committed, in the House of Commons. The second Reform Bill had been thrown out on the second reading in the House of Lords. The third Reform Bill, after passing the House of Commons and the second reading in the House of Lords, was in course of being so handled in committee as to defeat the objects of the ministry who had introduced it. Lord Grey and his colleagues resigned. A Tory ministry which Lord Lyndhurst and the Duke of Wellington endeavoured to form was made impossible by the refusal of Peel to be a party to any measure of Reform however moderate. Lord Grey was recalled, but the attitude of the Peers remained hostile. It seemed that the course which Harley and Bolingbroke had adopted would have to be followed and that a creation of peers, on a greater scale than was required in 1712, would become necessary. The King reluctantly assented to such a creation, but, at the same time, he had recourse to the policy of George III. His secretary was instructed to inform the Duke of Wellington

that the matter might be settled by 'a declaration in the House of Lords, from a sufficient number of peers, that they have come to the resolution of dropping their further opposition to the Reform Bill.' This communication caused Wellington, and with him the leaders of the Tory opposition in the House of Lords, to abstain from any further attack upon the bill, and it speedily became law.

The circumstances in which the threatened use of the prerogative to create peers secured the passing of the Parliament Act have already been described.

(2) Power of creating peers.

The actual creation of peers by the Crown in order to bring about the passing of a measure is a power which has only once been exercised.

In 1712 it was necessary, in order to secure approval of the Peace of Utrecht, that the Whigs should be placed in a minority in the House of Lords. The matter was promptly dealt with by the Queen and her advisers; twelve new peers were created, and a Tory majority secured. This exercise of the prerogative seems to have created no public excitement, nor to have met with much severer comment than the jest of Wharton, who asked the twelve new peers, as they were about to take part in a division immediately after taking their seats, 'whether they intended to vote singly or by their foreman.' Subsequently the advice given by Harley to the Queen was made one of the numerous articles of his impeachment; but the point was not pressed.

The use of the prerogative for the purpose of bringing the legislative action of the House of Lords into correspondence with the wishes of the people as represented in the House of Commons had in 1911 almost come to rank, with impeachment and the royal veto, among the things which might happen, but which certainly would not happen [1]; but the same might have been said of the action of the House of Lords which brought it about, and the one may fairly be

[1] It may, and does, happen in self-governing colonies which possess a Second Chamber nominated by the Governor on the advice of his responsible Ministers. A recent example is that of Queensland, where in 1920 the government of the day secured in this manner a majority in the Second Chamber, which in the following year proceeded to pass a government measure abolishing the Second Chamber itself.

set off against the other. The prerogative still exists and is unaffected by any of the provisions of the Parliament Act; but the machinery created by that Act makes it unlikely that recourse to the prerogative will ever again become necessary. In these matters, however, as events have shown, it is unwise to prophesy. The whole subject may indeed become in the near future of no more than historical interest, if and when the House of Lords gives way to a reformed Second Chamber.

CHAPTER IX

THE HIGH COURT OF PARLIAMENT

Functions of Parliament not only legislative,

THE legislative omnipotence of Parliament is perhaps the most conspicuous feature of our constitution to any one who seeks to compare the disposition of forces in different political societies. What is usually understood, elsewhere than in England, by a constitutional government, is a government the ordinary working of which is regulated by a written constitution, a constitution which cannot be altered by ordinary legislative procedure, which needs for its alteration some abnormal process for obtaining the expression of national consent.

But our Parliament can make laws protecting wild birds or shell-fish, and with the same procedure could break the connexion of Church and State or give political power to two millions of citizens, and redistribute it among new constituencies. It is little wonder then that with this constant process and possibility of change before our eyes, we lose sight of the other functions of Parliament in the contemplation of its legislative power.

but judicial.

As we had occasion to note in speaking of the Royal Proclamation for the summons of Parliament, the King calls a Parliament with no ostensible purpose of legislation, but that he may 'have the advice of his people.' And Parliament discharges various and important functions answering to the work of the ancient Council of the Crown. In dealing with the duties which the Houses discharge as constituting the High Court of Parliament, we must be careful to distinguish the direct from the indirect, those which are based on rules of law, and those which rest on use or convention.

§ 1. *The direct and indirect judicial power of the Houses.*

Lord Coke says boldly that, 'the Lords in their House have power of judicature, and the Commons in their House

have power of judicature, and both Houses together have power of judicature [1].' But we must strictly limit the sense in which judicial attributes are thus assigned to the two Houses severally and jointly.

Each has, as we have seen, a jurisdiction over its own members and over the general public in respect of contempt against itself. Each has certain powers of a judicial character in dealing with the constitution of its own body and the right of persons who claim to be members of that body. The Lords can try their own members if charged with treason or felony. They also constitute a final court of appeal for the United Kingdom. Acting jointly, the Lords can try and sentence a criminal impeached by the Commons, or a Bill of Attainder can be passed by both Houses and presented to the Crown.

Beyond this neither House has an original jurisdiction as a Court of first instance, but in times past each House has claimed such a jurisdiction.

Original jurisdiction claimed by the Lords;

The House of Lords at one time asserted a right to jurisdiction in matters of importance where the remedy given by the ordinary Courts might be inadequate or difficult of attainment—such a jurisdiction, in fact, as was exercised with salutary effect by the King's Council in the Star Chamber in the early part of the sixteenth century. It was in virtue of this claim that upon reference from the Crown they undertook to try the dispute between Skinner and the East India Company in the year 1667. Skinner complained that the company had seized his ship and goods, and had dispossessed him of a house and small island near Sumatra. The judges advised the Lords that Skinner had a remedy in the Courts at Westminster for the seizure of his ship and goods, but not for the loss of his house and island.

The Lords thereupon heard the case, and in April, 1668, gave judgement against the Company and in favour of Skinner for £5,000: in May, 1669, they sentenced the deputy governor of the Company, Sir Samuel Barnadiston, to pay a fine of £300, and to remain in custody till it was paid, for a breach of privilege in petitioning the Commons against

[1] iv. Inst. c. i, p. 23.

their action in the matter. Meantime the Commons had voted that the action of the Lords was contrary to law, and inasmuch as some members of the East India Company were also members of the House [1], that their privileges had been infringed. The quarrel between the two Houses was not brought to an end by a prorogation in December, 1669. It showed signs of reviving when the Houses met again in February, 1670. The King thereupon came forward as mediator, and at his request both Houses consented to erase from their journals all records and entries of the matter. The Lords thereby admitted that they had no jurisdiction as a court of first instance, and that to petition the Commons against such an exercise of jurisdiction was a fair exercise of the general right of the subject to petition [2].

and by the Commons.

The House of Commons too has set up a jurisdiction as a court of first instance to try political offences. Numerous cases are to be found in the Journals of the House during the seventeenth century of the exercise of such a supposed jurisdiction, but perhaps the most conspicuous is also happily the last. It occurred in 1721, when the House by resolution committed to Newgate a prisoner named Mist for the publication of a journal which contained expressions of a hope for the restoration of the Stuarts. There was no suggestion of a breach of privilege by Mist, and the House dealt with his conduct as constituting a purely political offence [3]. Although the House never repeated such an assumption of judicial power, yet in the eighteenth century, when privilege was in other respects extended to the detriment of free discussion, both Houses did take upon themselves to determine questions of private right arising between their members' servants and the outside public [4].

The ground of these claims.

The attempted assumption by the Lords of a jurisdiction in cases such as that of *Skinner* was probably a result of the disappearance of the jurisdiction, which, in the court of Star Chamber, had from time to time been exercised in

[1] Hatsell, vol. iii, p. 189.

[2] For a detailed account of this great controversy, see Hargrave's Preface to Hale, Jurisdiction of the House of Lords, pp. ciii–cxxiv.

[3] Hallam, Const. Hist. iii. 276.

[4] See instances cited in Pemberton on Privilege, p. 87.

a salutary manner for the bringing to justice of great offenders. The extensions of privilege to matters outside its proper limits were the acts of two irresponsible and not very public-spirited bodies at a time in our history when the privileges and emoluments of power were more regarded than its duties. It is not proposed to deal with these disputed or excessive exercises of jurisdiction, nor is it necessary to touch again upon the undoubted rights of the Houses to maintain their dignity by committal for contempt, and to provide that unqualified persons do not take part in their business or deliberations. Nor again need we here repeat what has been said in an earlier chapter concerning the right of a peer to be tried by his peers [1].

Forms of jurisdiction.

But the criminal jurisdiction exercised by Parliament through the process of impeachment is a distinct feature of its attributes as a court. The appellate jurisdiction of the House of Lords is doubtless a survival of a portion of the jurisdiction of the Curia Regis, and of the time when a session of Parliament was not easily distinguished from a session of the Magnum Concilium.

The practice of petitioning Parliament dates from a time when Parliament might be expected to attend to individual cases of hardship and provide a remedy.

And another judicial duty is thrown upon Parliament by the removability of certain officers of the executive upon address from both Houses to the Crown. These are the legal duties of Parliament as a high court.

Then we come to those which rest on use and convention, the practice of inquiring into the conduct of individuals or of departments by committee of either House ; of determining, by votes of censure or adverse decisions, on important subjects, that the executive has no longer the confidence of the country. The criticism and censure of the executive is not a judicial act, nor except in a figurative sense can it be regarded as a function of the High Court of Parliament. And yet it is impossible not to recognize the fact that members are returned to the House of Commons to give a qualified or unqualified support to a minister or a policy,

[1] *Ante*, p. 245.

and that though indirect in its operation the control exercised by Parliament on the choice and action of the ministers of the Crown is a part of its functions as the Grand Inquest of the nation.

§ 2. *Impeachment.*

Origin of the practice.

The practice of impeachment by the Commons at the bar of the Lords dates from the reign of Edward III. It should be distinguished from the system of Appeals in Parliament by which private accusers endeavoured to get a trial before Parliament of the person whom they charged with an offence [1]. The Lords had declared in 1387 that the case of any high crime touching the King's person and the state of his realm, committed by Peers of the realm, with others, should be dealt with in Parliament, and according to the law and course of Parliament [2]. Such a court bound by no settled rules, and disregarding the advice of the judges, might create the offence and the penalty in the course of its judicial proceeding; such appeals were forbidden by 1 Hen. IV, c. 14. They revive in an altered form in the Acts of Attainder, by which in the latter part of the fifteenth and throughout the sixteenth century persons who had played for a high stake in politics and lost it, or who, by no fault of their own, chanced to be on the unpopular side, were hurried to death with no form of trial.

Impeachment, on the other hand, was one of the various forms in which the Commons tried to obtain control over the conduct of the ministers of the Crown. The control was of value when King and ministers were prepared to disregard the law, and when Parliament could not bring constant, regular pressure to bear upon them. Thus out of fifty-four impeachments which have taken place since the year 1621, nineteen took place in the first three years of the Long Parliament. As soon as the House of Commons became able so to control and review the conduct of ministers as to make it impossible for them to conduct business without

[1] Sir FitzJames Stephen, Hist. of Criminal Law, vol. i, p. 154, appears to hold that Impeachment originated in these Appeals; but the two modes of procedure are in fact distinct.

[2] Rot. Parl. iii. 236.

a Parliamentary majority, impeachment lost its value and fell into disuse.

As only two cases, those of Warren Hastings [1] and Lord Melville, have occurred in the last hundred and fifty years, and none since 1805, the subject is hardly one of practical interest. It may be well, however, to summarize the procedure of an impeachment, and to note the constitutional questions that have from time to time arisen in respect of it.

Motion for impeachment.

The first stage in the proceedings is to induce the House of Commons to take action, and this is done by a member charging the accused person with high crimes and misdemeanours and moving that he be impeached.

If this motion is carried, the member at whose instance it was carried goes to the bar of the House of Lords and impeaches the accused 'in the name of the Commons of the United Kingdom.' A Committee of the House of Commons is then appointed to draw up articles of impeachment, and these, when drawn, are delivered to the House of Lords. They are also delivered to the person accused, who may, if he pleases, answer them.

Articles of impeachment:

trial:

If the accused is a peer he is taken into custody, for the purposes of the trial, by order of the House of Lords; if a commoner, by the serjeant-at-arms, who delivers him into the charge of the usher of the Black Rod. The Commons appoint managers to conduct their case, and the trial proceeds in Westminster Hall. The forms of a criminal trial are followed, the Lords sitting as judges, the Lord High Steward presiding if a peer is on his trial, the Lord Chancellor or Speaker of the House of Lords in the case of a commoner.

verdict:

At the conclusion of the case the question of 'guilty' or 'not guilty' is put to each peer, beginning with the junior baron, on each of the articles of impeachment. Each answers in turn, standing uncovered, with his right hand on his breast, 'guilty,' or 'not guilty,' 'upon my honour.' The numbers are ascertained, and the decision of the House

[1] Warren Hastings in India, like a minister in the seventeenth century, was in a position to do many questionable things before he could be called to account, but the proceedings in his case from their length and futility served to show that impeachment was out of date.

announced by the presiding officer to the House and to the accused.

If a verdict of guilty is found by a majority of the Lords, it still rests with the Commons to determine whether this verdict shall be proceeded upon. The Lords are not entitled to pronounce sentence until the Commons demand it.

sentence. When the Lords have determined upon the sentence to be given, they send a message to the Commons that they are ready to proceed upon the impeachment. It is still open to the accused person to offer matters in arrest of judgement, and for this purpose the managers attend the House of Lords, and the accused is brought to the bar. Then the Speaker of the House of Commons demands judgement, and it is pronounced by the Lord who presided at the trial.

Execution of sentence. The execution of the sentence pronounced by the Lords is like the sentence of any other criminal court, dependent upon the pleasure of the Crown. Although an ordinary prosecution is at the suit of the Crown, whereas an impeachment is at the suit of the Commons, the Crown is not thereby ousted of its prerogative of pardon. The King can pardon a person condemned upon an impeachment, or remit a part of the sentence, and has exercised this prerogative in various cases.

Some points have arisen in cases of impeachment which, after some controversy, appear to be settled by custom or statute :—

Case of Fitzharris. 1. It was at one time questioned whether a commoner could be impeached for anything but a misdemeanour ; and it was maintained that he cannot be impeached for a capital offence. In the case of Fitzharris, impeached by the Commons in 1681 for high treason, at a time when he was being proceeded against for the same act at common law, the Lords refused to proceed with the impeachment. Fitzharris was tried on indictment at common law, but the Commons protested against this action of the Lords, and in subsequent cases the objection was not raised, and the Lords resolved that the impeachment of a commoner for a capital offence should be proceeded with.

Case of Lord Danby.

2. Another question has arisen as to the right of the person impeached to plead a pardon under the Great Seal in bar of the impeachment. When the Earl of Danby was impeached, in 1679, he produced a pardon under the Great Seal, given after the proceedings in the impeachment had commenced, and given with a view to bar the proceedings against the accused. The Commons protested; indeed the course taken by the King, by Lord Danby, and by the Chancellor, Lord Nottingham, was open to the gravest objection, for the Crown was made directly and personally responsible for the very same act which the Commons had made matter of impeachment [1].

The question was set at rest by a clause in the Act of Settlement to the effect that 'no pardon under the Great Seal of England be pleadable to an impeachment by the Commons in Parliament [2].'

Effect of prorogation and dissolution.

3. The effect of a prorogation and of a dissolution of Parliament upon proceedings in an impeachment has been differently regarded at different times. Contrary resolutions have been passed by the House of Lords on these points, but the law may be stated as follows:—Proceedings in the House of Lords on an impeachment are unaffected by a prorogation or a dissolution, and this has been held without question since Warren Hastings' case in 1786. But to avoid all difficulty with regard to the proceedings of the House of Commons, an act was passed in each of the last two cases of impeachment [3] providing that they shall not be discontinued by prorogation or dissolution of Parliament.

The rights of the bishops.

4. As regards the position of the bishops during the course of an impeachment, the same difficulty has arisen as in the

[1] Journals of the House of Commons, ix. 575, and see vol. ii, The Crown, part i.

[2] 12 & 13 Will. III, c. 2, s. 3. In the curious case of *R.* v. *Boyes* (1861) I B. & S. 311, a witness in a prosecution for bribery had refused to answer a question on the ground that it might incriminate him. The Solicitor-General, who was conducting the prosecution, thereupon tendered him a pardon under the Great Seal, which the witness accepted but still refused to answer, because the pardon would, by reason of the Act of Settlement, afford him no protection if he were impeached. The Court held that this contingency was so remote and fanciful that it afforded no justification for the refusal.

[3] 26 Geo. III, c. 96; 45 Geo. III, c. 125.

Ante, p. 238.

case of the trial of a peer. The difficulty turns on the title of the bishop to his seat in the House of Lords, and on the question of 'ennobled blood.'

The practice is, however, settled by custom and resolution of the House. The Lords have resolved 'that the Lords spiritual have a right to stay and sit in Court in capital cases, till the Court proceed to the vote of guilty or not guilty[1].' And by custom the bishops sit in the House during the trial and vote on any incidental questions that may arise, but withdraw before judgement is given, entering a protest 'saving to themselves and their successors all such rights in judicature as they have by law, and by right ought to have.'

Acts of attainder.

We may pass over those acts, in form legislative, in substance judicial, styled acts of attainder or of pains and penalties. An Act of Parliament can, as we know, do anything. It can make that an offence which was not, when committed, an offence against any existing law; it can assign to the offender, so created, a punishment which no Court could inflict. The procedure is legislative and, as such, differs in no respect from legislation on any other matter of public importance.

§ 3. *Appellate Jurisdiction of the House of Lords.*

To discuss the history of the appellate jurisdiction of the House of Lords would lead us far into legal and parliamentary antiquities. If one may venture upon a general statement the process of its attainment may be described as follows. After the three Common Law Courts had been parted from the *Curia Regis* and had acquired distinct jurisdiction in cases concerning the King's interest, or the King's revenue, or concerning suits between subject and subject, there yet remained in the King a residuary judicial power. This power was called into play where the Courts were not strong enough to do justice, or were deficient in rules applicable to the case at issue, or were alleged to have decided wrongly. The exercise of jurisdiction in cases where, from the greatness of the offender or the importance of the issue, it was thought

Residuary judicial power of Crown.

[1] 13 Lords' Journ. 571.

that the Courts could not do adequate justice, seems to have assumed various forms. Such cases were dealt with by the Crown in Parliament, the Crown in Chancery, and the Crown in Council. As Parliament became more distinctly a law-making and tax-granting body, cases of this nature, when brought before it, assumed a political aspect. Appeals in Parliament were forbidden in 1 Hen. IV, and so far as this jurisdiction survived in Parliament at all it survived in the form of acts of attainder and private or personal acts. The Chancellor too, as his jurisdiction took shape, eliminated cases of this character, and they fell wholly into the hands of the Council. And the Council or the Star Chamber, as employed by Henry VII, 'brought down punishments on the heads of the great, when it was difficult to find a jury which would not be hindered by fear or affection from bringing in a verdict against them even if it could be supported by the strongest evidence [1].'

Punishment of great offenders by Council.

The exercise of jurisdiction in cases where the Courts were unable to provide rules suitable to the matter in hand passed into the Chancery, which developed a supplementary body of law to meet the deficiencies occasioned by the rigidity of the Common law.

Common law rules supplemented in Chancery.

The appellate jurisdiction in cases of error passed into the House of Lords, and is all that Parliament retained of the residuary judicial power vested in the Crown. Records were, as Lord Hale tells us [2], brought from other courts, sometimes to be examined *in pleno parliamento*, sometimes *coram praelatis, proceribus et magnatibus in parliamento*.

Error from Common law Courts went to the Lords.

In the reign of Henry IV the Commons requested to be relieved of the judicial business of Parliament [3], and the Lords alone have exercised this jurisdiction. Appeal lay to the House of Lords by writ of error from the Common Law Courts, alleging error of law appearing upon the face of the record. Early in the seventeenth century the House assumed, and (after some conflict with the House of Commons in the reign of Charles II) continued to exercise jurisdiction

And appeal from equity Courts.

[1] Gardiner, Hist. of England (1883), i. 5.
[2] Hale, Jurisdiction of the House of Lords, c. xxii (p. 127, ed. Hargreave).
[3] Stubbs, Const. Hist. iii. (5th ed.) 24 and 494.

in cases of appeals from decrees in equity [1]. Such an appeal was made by way of petition and not by writ of error, and was of the nature of a rehearing, though no new evidence was admitted.

Proceedings in Error before the House of Lords have been abolished by the Appellate Jurisdiction Act, 1876 [2], and all appeals take place by way of a rehearing on petitions in a form provided by the Act, and by rules made in pursuance of the Act; this procedure need not concern us here.

Its effect.

But it should be noted that the Appellate Jurisdiction Act, 1876, places the jurisdiction of the House of Lords upon a statutory basis [3], and determines the constitution of the Court in so far as it provides that no appeal shall be heard unless there are at least three members present who have judicial experience of the kind described in the Act. A sitting of this Court is, however, a sitting of the House of Lords; bills may be, and sometimes are, read at it a first time [4]; the forms of giving judgement follow the forms of carrying a motion on any other subject; and the Appellate Jurisdiction Act, with its amending Acts [5] of 1887, may be said to have been directed not so much to changing the character, as to securing the efficiency of that branch of the High Court of Parliament which acts as a final Court of Appeal. Of its functions in that capacity it will be proper to speak in dealing with the Courts.

§ 4. *The Right of Petitioning.*

The right to petition was said by one of the Judges in the Seven Bishops' case to be 'the birthright of the subject': in the Great Charter the King promised that he would not

[1] *Shirley* v. *Fagg* (1675), State Trials, vol. vi, p. 1122.

[2] 39 & 40 Vict. c. 59.

[3] By s. 1 (6) of the Criminal Appeal Act, 1907 (7 Edw. VII, c. 23), an appeal also lies to the House of Lords from a decision of the Court of Criminal Appeal on a certificate by the Attorney-General that a point of law 'of exceptional public importance' is involved.

[4] See 44 Parl. Deb., 5th ser. (H. of L.), 180–9, debate of March 1st, 1921, in the course of which the practice was recognized as technically correct, though open to criticism on constitutional grounds as confusing the legislative and judicial functions of the House.

[5] 39 & 40 Vict. c. 59; 50 & 51 Vict. c. 70.

deny or postpone justice to any one, and thus whosoever in the thirteenth or fourteenth centuries wanted by peaceable means to get anything which was not recoverable in the courts of law, addressed a petition to the King in that great council of which Parliament was at first regarded as a session. Legislation itself was, as we have seen, for a long time initiated by petition of the Commons or Clergy to the King in Council; individuals addressed the King in his great Council or in Parliament; and it was held that wherever 'from the poverty of the petitioner, the power of his adversary, the insufficiency of the law, or any other similar cause, he could not obtain redress, then the Supreme Court of Parliament was to give him a speedy and effectual remedy [1].' For the assortment of these petitions different arrangements were made from time to time. Edward I appointed receivers and triers, and as the procedure of Parliament became organized, its first business upon opening was to hear the names of the receivers and triers of petitions appointed by the King from among the Lords of Parliament.

Petitions asking for legal remedies.

The receiver's duty was to be accessible to all persons who had complaints to make, such persons being invited by public proclamation, and to transmit their petitions, when received, to the triers. The triers assorted the petitions, handing over each to its appropriate tribunal, the Judges, the Chancery, the Council, or Parliament.

Receivers and triers appointed until 1886.

Strangely this practice survived until 1886 in the procedure of the House of Lords. At the commencement of every Parliament receivers and triers of petitions were appointed. The receivers were judges or masters in the Courts; the triers were chosen from among the temporal peers [2].

[1] Select Committee on Public Petitions, 1833.

[2] The entry appears upon the Journals of 1880 as follows:—

'Les Recevours des Petitions de la Grande Bretagne et d'Irlande:

'Messire Alexander Edmund Cockburn, Chevalier et Chief Justicer de Banc Commune.

'Messire Robert Lush, Chevalier et Justicer.

'Messire Henry William Frayling, Ecuyer.

'Et ceux qui veulent delivre leurs Petitions les baillent dedans six jours procheinment ensuivant.

'Les Recevours des Petitions de Gascoigne et des autres terres et pays de par la mer et des Isles.

Petitions passed out of this stage as the functions of the Courts, the Chancery, the Council, and the Parliament became definite. The suitor then went direct to the place where a remedy was attainable.

By the end of the reign of Richard II the Chancery had built up an equitable jurisdiction supplementary to that of the Common Law Courts: the King's Council, too, was now clearly distinct from Parliament; among its other functions it afforded a remedy to suitors who were too poor to meet the charge of litigation in the Common Law Courts or were oppressed by persons too powerful to be dealt with by the ordinary process of law. The High Court of Parliament was no longer the resort of suitors who desired a remedy for individual grievances. Their place was taken by suitors of another sort, who desired to use the legislative powers of Parliament to obtain a *privilegium*, a change of the law for their benefit, or an exemption from its provisions. From the time of Henry IV such suitors become frequent, addressing themselves chiefly to the Commons, sometimes to both Houses of Parliament, sometimes to the King in Council. But such petitions, to whomsoever they were addressed, were met and dealt with by legislation, which received the assent of Crown and Parliament.

Petitions asking for *privilegia*.

'Messire Fitzroy Kelly, Chevalier et Chief Baron de l'Exchequer de la Reyne.

'Messire Charles Edward Pollock, Chevalier et Justicer.

'Messire John Walter Huddleston, Chevalier.

'Et ceux qui veulent delivre leurs Petitions les baillent dedans six jours procheinment ensuivant.

'Les Triours des Petitions de la Grande Bretagne et d'Irlande;

'Le Duc de Bedford.

'Le Duc de Devonshire.

'Le Marquis de Lansdowne.'

[And twenty-one other peers.]

'Touts eux ensemble, ou quatre des Seigneurs avantditz, appellant aux eux les serjeants de la Reyne, quant sera besoigne, tiendront leur place en la Chambre du Tresorier.

'Les Triours des Petitions de Gascoigne et des autres terres et pays de par la mer et des isles:'

[Then follows a list of twenty-one peers.]

'Touts eux ensemble, ou quatre des Seigneurs avantditz, appellant aux eux les serjeants de la Reyne, quant sera besoigne, tiendront leur place en la Chambre du Chambellan.'

Private bill legislation was simpler in its objects than it is now, though similar in its character. An estate act, a divorce act, a naturalization act, are modern instances of the limited kind of *privilegia* which petitioners sought when they first asked Parliament to alter the law on their behalf. A railway or canal bill, though conferring exceptional rights on a corporation, may affect in its operation the proprietary rights of very many, and the comfort or prosperity of a large portion of the community. The line between public and private legislation is less easily drawn than it was in the early days of private petitions.

But we have so far spoken only of petitions of two kinds—petitions which asked Parliament for a remedy afterwards given directly by the Courts or the Council, and petitions which asked for changes or exemptions from the law on behalf of individuals.

Public petitions,

What are called public petitions, that is, petitions complaining of public grievances, and asking for some change in the general law, or some legislation to meet new circumstances, are not common before the seventeenth century.

A Committee of Grievances, to which petitions were referred, was appointed by the House of Commons in 1571, and throughout the reigns of James I and Charles I entries appear in the Journals of the House regulating or referring to the proceedings of this Committee. In January, 1640, we find this entry :—

'Members added to the Committee for sorting petitions, and are specially to consider of and to sort such petitions as concern the public.'

Such petitions multiplied during the first years of the Long Parliament, and after the Restoration it was thought well to restrict tumultuous petitioning on matters of public policy.

13 Car. II, st. 1, c. 5, prohibits under penalty of £100—

legal restrictions on presentation,

(1) The signing of petitions to the King or either House of Parliament for any change in Church or State by more than twenty persons, unless approved, in the country, by

three justices of the peace or a majority of the grand jury sitting at assizes or quarter sessions, in London by the Mayor, Aldermen, and Common Council:

(2) The presentation of a petition by a company of more than ten persons.

The Bill of Rights asserts generally that:—

'It is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.'

The statute law relating to petitions is thus of little moment; for the Act of Charles II seems to be construed as directed not against petitioning, but against the presentation of petitions in a tumultuous manner; while the Bill of Rights merely asserts a general right to petition the King. It is more important to follow the dealings of the Lords and the Commons with regard to petitions submitted to them.

right of commoner to present them,

As to the respective rights of petitioners to petition, and the Commons to deal with such petitions, the House declared the principles on which it would act in two resolutions passed in 1669, which run thus:—

'That it is an inherent right of every commoner in England to prepare and present Petitions to the House of Commons in case of grievance, and the House of Commons to receive the same.'[1]

right of Commons to reject them.

'That it is an undoubted right and privilege of the Commons to judge and determine concerning the nature and matter of such petitions, how far they are fit or unfit to be received.'

The right to make and present petitions, and the right to receive and consider petitions was so far clearly set forth, but it has been a matter of increasing difficulty to deal with petitions as they became more frequent.

Earlier procedure.

Every petition must be presented to the House by a member, and the presentation, the reading and often the discussion of petitions made inroads upon the time of the House, which eventually needed limitation. Petitions had to be presented before 10 in the morning: at that hour,

[1] See *Pankhurst* v. *Jarvis* (1911), 101 L. T. 946.

fifty years ago, members who had petitions to present came down and balloted for places; if a member came out high on the list he might get his petition presented and read, and, if need be, discussed that evening. If he got a low place on the ballot, the time allowed for the reception of public petitions might, owing to pressure of the public business of the House, be too short to enable him to present his petition, and he would have to reappear at 10 a.m. the next day to take his chance of another ballot.

Growth of petitioning.

The numbers of petitions steadily increased. In the five years ending 1789 it was 880. In the five years ending 1831 it was 24,492. In the five years ending 1877 it was 91,846. The cost of printing petitions amounted between 1826–1831 to £12,000.

Rules of the House.

To remedy these troubles the House has framed various rules. A Select Committee is now appointed, in pursuance of a resolution of February 20th, 1833, to which are referred all petitions except such as relate to private bills. The duty of this Committee is to classify, to abstract, and to report. Its reports are issued at intervals during session, and the Committee has power to direct the printing of a petition *in extenso*, and to limit its circulation to members of the House [1].

As a consequence of this process of classification and abstracting of petitions by the Committee, the House has been able to economize its time in the presentation of petitions, and by standing orders of 1842 and 1853 to limit the dealings with a petition on its presentation by a member to a statement of the parties from which it comes, the number of signatures, the material allegations and the prayer with which it concludes. No debate is allowed, but the petition if required to be read may be read by the clerk of the House. The rule as to debate may be set aside, and the petition discussed if it should disclose a case of urgency for which an immediate remedy is required [2].

Form and matter of petitions.

It remains to consider how the House will deal with Petitions which are in form insufficient, or in matter such as the House considers 'unfit to be received.'

[1] Standing Orders, 76–80.

[2] Ibid.

In form a petition must satisfy certain requirements. It must be written, it must be free from erasures or interlineations, it must not be a simple memorial or remonstrance, but must conclude with a prayer.

In matter it must be respectful of the privileges of the House, and free from disloyalty or expression of intention to resist the law. Beyond this the inclination of modern times is to allow the widest latitude to petitions.

Cases of rejection.

One may profitably compare the Kentish Petition with a somewhat less celebrated, though at the time notorious, petition of the year 1875.

The Kentish petition.

The Kentish Petition [1], drawn up on the 29th of April, 1701, and signed by all the Deputy Lieutenants of the county present, more than twenty Justices of the Peace, and a large number of freeholders, was intended to urge the Commons to greater dispatch of business, and to enable the King to fulfil his treaty obligations with the States General. It concluded with a prayer 'That this House will have regard to the voice of the people: that our religion and safety may be effectually provided for; that the loyal addresses of this House may be turned into bills of supply; and that His Majesty may be enabled powerfully to assist his allies before it is too late.'

On this petition the following resolution was passed—

'That the Petition is scandalous, insolent and seditious, tending to destroy the Constitution of Parliament, and to subvert the established Government of this realm.'

The gentlemen who presented the petition were voted guilty of a breach of Privilege, and were imprisoned by order of the House.

The Prittlewell petition.

The Prittlewell Petition was presented in the year 1875, and related to the conduct of the three judges who presided at the trial at bar of Orton, the claimant of the Tichborne estates. But the petition did not merely impugn the good faith of the judges, it suggested that the Speaker had not been impartial in dealing with complaints of the conduct of this trial.

[1] 13 Commons' Journals, 518.

The Select Committee on public petitions drew the attention of the House to this document, and after an interesting debate the order that the petition should lie upon the table was read and discharged [1].

It would seem from the tenor of the debate that the ground of objection to the petition was the reflection on the Speaker's impartiality. It would not have been a ground for rejection that the conduct of the judges was commented upon with freedom, for the precedents of the last thirty years go to show that the House wisely allows petitioners to express anything short of an intention to break the law, or a contempt for the body to which they appeal for redress.

A petition may be rejected at once, upon its presentation by the member in charge of it; or, as in the case of the Prittlewell petition, it may be ordered to lie on the table, and when attention is drawn to it by the Select Committee, the order may be discharged and the petition thereupon rejected.

§ 5. *Committees of Inquiry.*

Origin of the practice.

The practice of inquiring into the conduct of individuals or of departments of government by means of special or select committees of the House is said by Mr. Hallam [2] to have begun in the year 1689. The mismanagement of the war then being carried on in Ireland was the cause of this inquiry being instituted, and upon its report, which reflected severely upon the conduct of Colonel Lundy, the governor of Londonderry, the House addressed the Crown with a request that he might be sent to England for trial on the charge of treason.

Need of power to administer oaths.

This right of inquiry, since frequently exercised, depended for its efficacy on the exercise of parliamentary privilege to enforce attendance of witnesses and production of documents; but it was for a very long time hampered by the want of power in the House or in any committee of the House to administer an oath. Gradually, and for certain occasions, the power was given to committees to examine witnesses upon oath. The first concession of this right

[1] 130 Com. Journ. 134; 223 Hansard, 3rd ser. 976.

[2] History of England, iii. 143.

was made by the Grenville Act, 1770, in the case of committees for trying disputed returns; the power was subsequently given to committees upon private bills; and finally, by the Parliamentary Witnesses Oaths Act, 1871 [1], the House of Commons may administer an oath to a witness at the Bar of the House, or any committee of the House may administer an oath to the witnesses examined before it [2].

The scope and character of the inquiry may vary greatly and the value of the inquiry may vary in proportion. A committee may be appointed to take evidence as to the working of a department, as to the propriety of bringing new matters under the supervision or control of the executive, as to the causes of a disaster, as to the conduct of an individual.

'A Committee,' said Mr. Gladstone in 1855, 'is extremely well fitted to investigate truth in its more general forms, by bringing every possible form of thought to bear on the points before it; but it is also well fitted for overloading every question with ten or fifteen times the quantity of matter necessary for its consideration; and therefore as ill as possible calculated for those rapid searching and decisive inquiries which have practical remedies rather than the arriving at general propositions for their main business [3].'

These words indicate the limits within which committees of either House may profitably work. They may collect facts with a view to future legislation; they may be used to ascertain a specific fact, as when a committee examined the physicians of George III with a view to the ascertainment of his mental condition. But they may also trench upon judicial or executive functions. Thus on the 29th January, 1855, the House of Commons determined to appoint a committee to inquire 'into the condition of our army before Sebastopol, and into the conduct of those departments of Government whose duty it has been to administer to the wants of that army.' This vote of the

The Crimean Committee.

[1] 34 & 35 Vict. c. 83.

[2] If a witness refuses to answer questions addressed to him by the Committee, the matter is brought before the House as one of Privilege, and the witness may be brought to the Bar: case of Mr. Kirkwood (1897), 152 Com. Journ. 361; case of Mr. Maxse (where, however, the House took no action on the Committee's report) (1912), 167 Com. Journ. 543.

[3] 136 Hansard, 3rd ser., p. 1837.

House of Commons was treated as a vote of censure by the Government of Lord Aberdeen. He and his colleagues resigned, and Lord Palmerston became Prime Minister. But Lord Palmerston proposed to treat the vote of the 29th of January not merely as a vote of censure on Lord Aberdeen's Government, but as an expression of intention on the part of the House to inquire into the past and present conduct of the war in the Crimea. The committee was appointed; but the acquiescence of Lord Palmerston in its appointment cost him the adhesion of three prominent members of his Government, Sir James Graham, Mr. Sidney Herbert, and Mr. Gladstone. They urged that to hold such an inquiry in the midst of war would necessarily paralyse the departments of government which were engaged in superintending and providing for our military operations, that it would be unfair to the officers who were conducting them on the spot, and that if the appointment of the committee meant anything, it meant that the House proposed to interfere with the management of the war. Mr. Gladstone was of opinion that 'an inquiry such as is proposed is incompatible with real confidence on the part of Parliament in those who hold executive office, and entirely incompatible with the credit and authority which ought, under all circumstances, to belong to the Ministers of the Crown, whatever party or political creed they may profess'.

This is an extreme view and seems to put the case too high. The power of the House of Commons to criticise the action of the executive and call Ministers to account is undoubted, but the appointment of a Committee of the House to ascertain facts and even to apportion responsibility is distinguishable from the direct interference with executive action which would ensue from Parliamentary inquiries held on transactions which were in course of being carried through by Ministers.[1]

A Government may, however, prefer to adopt an inter-

[1] See 84 Parl. Deb., 5th ser., 1236; speech of Mr. Asquith on 20th July, 1916, on the motion for a Select Committee to inquire into the operations in Mesopotamia and the Dardanelles. Governments have seldom had less cause to complain of interference with executive functions by the House of Commons than during the late war.

Tribunals of Inquiry,

mediate course and to assent to the appointment of a body which, though consisting largely of members of one or both Houses, contains also an outside element, and is therefore in the nature of an independent tribunal and less likely to be influenced by party bias. Such were the Commissions set up by statute to investigate not only the inception and conduct of the operations in Mesopotamia and the Dardanelles during the late war, but also (following the Crimean precedent) 'the responsibility of those departments of Government whose duty it has been to minister to the wants of the Forces employed in those theatres of war'.[1]

The executive can always through the agency of Royal Commissions hold inquiries on its own account and is responsible for the appointment of such Commissions and the conduct of their inquiries; but the method of inquiry illustrated by the Mesopotamia and Dardanelles Commissions seems likely to gain ground in cases where the subject matter of the inquiry is one which has excited immediate political or popular interest, and where the ascertainment of the truth may, unless entrusted to an independent and semi-judicial body, become difficult by reason of the introduction of party feelings and prejudice.

their statutory powers.

And an Act has now been passed[2] which provides that where it has been resolved by both Houses of Parliament that it is expedient that a tribunal be established for inquiring into a definite matter described in the Resolution as of urgent public importance, and in pursuance of the Resolution a tribunal is appointed for the purpose either by His Majesty or the Secretary of State, the instrument of appointment may confer on the tribunal the powers given by the Act. These include all the powers of the High Court in respect of the attendance and examination of witnesses and the production of documents, and the right to bring before the High Court with a view to their punishment for contempt persons who refuse to appear or give evidence before the tribunal or who commit any act which would constitute contempt of court in legal proceedings.

[1] Special Commissions (Dardanelles and Mesopotamia) Act, 1916 (6 & 7 Geo. V, c. 34).

[2] Tribunals of Inquiry (Evidence) Act, 1921 (11 Geo. V, c. 7).

§ 6. *Address for the removal of servants of the Crown.*

The report of a committee of inquiry may form the foundation, though it need not be the only foundation, for an exercise of the judicial functions of Parliament.

Mode of procedure for removal of an officer of state.

Certain officers of state, the most important and conspicuous of whom are the judges [1], are removable upon an address to the Crown made by both Houses of Parliament. The ground of proceedings by address may be the petition of an individual, the motion of a member, or the report of a Select Committee appointed in consequence of such petition or motion.

These proceedings assume a judicial character, and it would appear proper that they should begin in the Commons. For the Commons are especially 'the grand inquest of the High Court of Parliament'; and there is this further reason against such proceedings being commenced in the Lords, that if when the matter came before the Commons they thought it a case for an impeachment, the Lords would be in the unsatisfactory position of judges who had pre-judged the case on which they were called to decide.

Committee of inquiry.

The House of Commons, having appointed a committee to inquire into the truth of charges made, whether by petition or on motion, and having received the report of the committee, hears the official complained of in his defence. It may accept without further inquiry the report of the committee [2], but the better opinion seems to be that the evidence against the person charged, although it has already been taken by the committee, should be heard at the bar of the House.

Address to Crown.

If the House of Commons is satisfied of the truth of the charges made, an Address to the Crown is drafted praying the removal of the officer charged, and this, when agreed to, is communicated to the Lords. They, if they please, inquire again into the evidence, and, if satisfied, agree to the Address and send a message to the Commons to that

Agreement of Lords.

[1] By the Act of Settlement (12 & 13 Will. III, c. 2).

[2] See the case of Sir Jonah Barrington, set forth at length in Todd's Parliamentary Government in England, ii. 736 (867 in ed. of 1889).

effect. Thereupon members of the two Houses are deputed to present the Address to the Crown.

In cases of the sort described, Statute has provided for the exercise by the Houses of this judicial power. In the particular instance of the judges the Act of Settlement introduced this Parliamentary control in addition to the powers of removal which the Crown possesses if a judge should misconduct himself in the business of his office. But an address for the removal of an officer of State, proffered to the Crown by either House, may be no more than an expression of disapproval of the conduct of the executive generally, or of an individual member of it in particular.

§ 7. *Parliament and the Ministers of the Crown.*

Address for removal of Minister,

In discussing the limits which should be assigned to inquiry by Select Committees, we came upon the relations of the Houses of Parliament to the Ministers of the Crown, and touched the point at which danger arises from the interference of a popular assembly with the action of the executive. That point is not easy to define. The modern practice of questioning Ministers of the Crown in either House, joined to the facility with which information of some sort on all subjects is procurable through the post, the telegraph, and the press, would seem to keep the executive under a standing committee of inquiry. And yet it is also certain that Parliament recognizes to the full the importance of non-intervention in matters of government, and that on the rare occasions when it has encroached upon executive functions, such encroachment was the result of error rather than intention [1]. Disapprobation of a minister, of a department, of a policy, may be and is from time to time expressed, but interference with the action of a Minister, or of a department, or with the development of a policy is, on the whole, carefully avoided.

Yet an expression of confidence or disapproval is a judgement passed by one or other House upon the Ministers of

[1] The intervention of the House of Lords in a matter of Royal Air Force discipline in 1919 may be cited.

the Crown. It may relate to a matter for which an individual Minister is responsible, a matter unconnected with the general character or policy of the Government. In such a case the retention of office by the individual may alone be affected by the vote. Or it may relate to matters for which the Ministry considers itself collectively responsible, and may thus bring about the retirement of the Ministers of the Crown and a change in the policy of the country.

Yet it would seem that the House of Commons is as reluctant to interfere in the composition as it is in the action of the executive. For when the confidence of the nation in a Ministry is withdrawn, this is indicated either by the unmistakable verdict of the polling booths, as in 1868, 1874, 1880, 1886, 1905, or by an adverse vote in the House of Commons on some matter which Ministers regard as vital. There are but three instances, all in Queen Victoria's reign, of a definite expression of opinion by the House of Commons that the Crown should change its Ministers—of a definite vote by the House to the effect that it is expedient that Ministers should possess the confidence of the House and of the country, and that such confidence is not reposed in the present Ministers of the Crown. Votes of this nature having been passed in 1841, in 1859 and in 1892, led in each case to the resignation of the Ministry.

or of want of confidence in Ministry.

But the effect and legal character of a vote of this nature must be carefully distinguished from an address such as that for the removal of a judge. The latter is a statutory remedy given to the estates of the realm for the security of the due administration of justice: the former is a mode of expressing disapproval of the individuals whom the Crown employs for the time being in the transaction of the business of government.

Differs from an address for removal of a judge.

And thus we are led by graduated stages from the direct and legal exercise by Parliament of judicial power, in cases of supreme importance, to the exercise of that constant criticism and control of the executive which our system of Cabinet government puts into the hands of the legislature. By questions addressed to Ministers of the Crown, by motions for papers on matters of present interest, the

Control of Parliament over executive;

members of either House can keep a check on current business and obtain explanation of its conduct, so far as is not inconsistent with the public advantage. By votes of censure, or by votes expressing want of confidence, by adverse majorities in important questions, Parliament can pronounce judgement on those officers of state to whom the King has entrusted the conduct of affairs.

a matter of convention.

But here we pass outside the region of law and come to those conventions or constitutional understandings which, as Professor Dicey has said, 'may be expressed with ease and technical correctness in the form of regulations in reference to the exercise of the prerogative[1].' As such they should be more properly deferred for treatment when we come to deal with the prerogative of the Crown in respect of the choice of Ministers and the determination of policy. But here it may be well to say this much.

Ultimate legal sanction.

Such control as the House of Commons exercises over the choice of Ministers by the Crown rests, so far as it has any legal basis, on precisely the same footing as the necessity for annual Sessions of Parliament. If Parliament does not meet, the army cannot be maintained, and much of the revenue of the year cannot legally be paid away. If Parliament does meet, the House of Commons has power, if so minded, to refuse to pass the Army Bill and the Appropriation Bill. The necessity for summoning a Parliament and the necessity for keeping on good terms with that Parliament are therefore the same; and it is the House of Commons which wields the power in these matters, because the Crown can, as we have seen, alter the composition of the House of Lords by a creation of Peers, while it can only alter the composition of the House of Commons by an appeal to the electorate.

If therefore the majority of the House of Commons and the Ministry are hopelessly at variance, and the House of Commons expresses its opinion by votes of censure, the Crown must do one of three things: it must either keep its Ministers and its Parliament, with the intention, should the necessary statutes not be passed, of maintaining an

[1] Dicey, Law of the Constitution (ed. 7), 422.

army, and spending the public money in defiance of law; or it must keep its Ministers and dissolve its Parliament; or it must keep its Parliament and change its Ministers.

The legal sanction not resorted to;

But practically these sanctions are not contemplated when a Ministry is changed. A Ministry may last for years which is in a permanent minority in the House of Lords, yet the House of Lords does not attempt, and nobody ever supposes that it will attempt, to throw out the Army Bill. When a Ministry is censured by the House of Commons, or is beaten on a division in a matter which it has declared to be vital to its existence, nobody ever supposes that it will remain in office and violate the law. We expect that the Ministers will tender their resignations unless they have reason to believe that the House of Commons does not represent the feeling of the country, and in that case they will ask the King to dissolve Parliament, and will appeal to the electorate.

But we must not forget that the possible violation of the law is not the only reason why a Ministry should retire when it is shown to have lost the confidence of the House or of the country. Ministers are not only the servants of the King, they represent the public opinion of the United Kingdom. When they cease to impersonate public opinion they become a mere group of personages who must stand or fall by the prudence and success of their action. They may have to deal with disorders at home or hostile manifestations abroad; they would have to meet these with the knowledge that they had not the confidence or support of the country; and their opponents at home and abroad would know this too [1].

but necessitates harmony of Ministers and Commons,

We arrive then at this point, that the King, as represented by his Ministers, must, by the conventions of the constitution, work in harmony with public opinion as

[1] It is possible for a Ministry to remain in office for a considerable time after undergoing a vote of censure without any risk of breaking the law. Lord Salisbury's government, in 1892, might have held office during the recess, for a period of five or six months, after a vote of want of confidence had been passed by the House of Commons. The practical and vital objection to such action on the part of a Ministry would be found in the weakness of its position if it had to discuss critical diplomatic questions with foreign powers.

represented by the members of the House of Commons. The legal necessity lies in the background; it forms an ultimate sanction which is not often present to the minds of those who act upon it.

as representing Crown and People.

The conventional necessity is wholly outside the contemplation of law. The will of the electorate can only be expressed through its representatives, just as the will of the Crown can only be expressed through its Ministers, and what is sometimes talked of as 'the mandate of the constituencies' has no legal value.

A member of the House of Commons represents not merely the constituency which has returned him to Parliament, but the entire kingdom[1]. He is bound to respect the wishes of his constituents, partly because he may have engaged himself at the time of his election to try and promote them, partly because he may fear rejection on the next occasion of his being a candidate if he does not act up to his professions. But he is bound also to remember that he represents the Commons of the realm, and that the interests of his constituency are but a fraction of the interests which he has in charge.

If therefore a Ministry were placed in a minority in the House of Commons on a vote of censure, this would be an indication, probable though not certain, that the majority of the electorate desired to see the policy of the country directed by other hands: it would foreshadow remotely certain legal difficulties which have never as yet been allowed to arise.

Verdict of a general election.

Under the existing conditions of our political life the electorate at a general election decides which party is, for some years, to govern the country. The Ministers who are the leaders of this party are not likely to be placed in a minority, under ordinary circumstances, during this time.

Their majority may become attenuated by adverse bye-elections: their followers may grow careless and indolent: some great new issue may suddenly arise which breaks existing party lines, such as Home Rule in 1886, and Tariff

[1] Coke, 4 Inst. 14; and see *Osborne* v. *Amalgamated Society of Railway Servants* [1910] A. C. 87, judgement of Lord Shaw.

Reform in 1903: or an advantage may be taken of some chance combination of circumstances, which, combined with carelessness on the part of the ministerial majority, may by what is known as a 'snap vote' place them, for the moment, in a minority on a division.

Relations of Ministers and followers.

Apart from these exceptional circumstances Ministers are usually secure of the support of those who were sent to support them by the electors.

The followers of the party in power do no doubt hold the life of the Government in their hands. They can end it by a withdrawal of support. But the Government, in turn, holds in its hands the Parliamentary existence of its supporters. The Prime Minister by claiming a dissolution can send his refractory followers to their constituencies; and we are beginning to realize, since 1885, the proverbial fickleness of a democracy.

Here we pass outside the region of Statute or Common Law or constitutional convention.

Criticism comes from minority.

We are in the habit of saying that a Ministry lives under the constant criticism of the House of Commons, and can continue to live only by the goodwill of the House of Commons. But the criticism is the criticism of the minority, and the goodwill of the majority has come, through the agency of party organization, to be somewhat mechanical and unreal. It would be more true to say that the House of Commons has become a machine for expressing the opinion of the constituencies, as that opinion, organized and moulded by party management, was formulated, or was supposed to be formulated, at the preceding general election.

Power of constituencies,

The mediaeval House of Commons demanded that the officers of state should be chosen by themselves: the House of Commons in the seventeenth century used the process of impeachment as a check on Ministers whose policy displeased them: from the Revolution onwards, the House in theory, and to a large extent in practice, determined the choice of the men whom the Crown should employ and exercised a control over their policy and their continuance in office. Throughout the eighteenth century, and indeed until after the Reform Act of 1832, the influence of the

Crown was a factor, sometimes a potent factor, in the construction and life of a Ministry; but from 1832 to 1885 we may say that this theory was in fairly close correspondence with practice.

In recent times the power thus exercised by the House of Commons has passed, in great measure, to the electorate, who can only use it at intervals, and only with effect at a general election. Party organization combines with electoral conditions to narrow the choice of constituencies to the strict supporters of definite programmes or leaders; while party discipline controls the action of the majority in the House, and while it cannot always silence criticism can ensure that criticism does not take effect in the form of an adverse vote.

and of outside organizations.

It is also to be observed that certain functions, which in a less highly specialized age might have been regarded as appropriate to Parliament alone, have been gradually assumed by outside organizations representing large and important interests, the great trade unions, employers' associations, professional societies, and others. The existence of these bodies indicates a development upon the lines of what is sometimes known as 'functional representation'. They have their own constituents, whose support may be essential to the Government of the day; they can bring an expert knowledge to bear on particular problems of government which the ordinary member of Parliament cannot always be expected to have; and representing, as they do, the interests of economic groups rather than of communities, their influence can be exerted more rapidly and effectively than would be possible through Parliamentary machinery. Yet, though complaint is made that Parliament is sometimes called upon to do no more than register its approval of arrangements made outside between the Government and these organizations, and that its constitutional rights are thereby infringed, it retains the right of final supervision and control. Just as the English jury performs its most valuable function in applying the touchstone of common sense to legal problems, so in a larger sphere does the House of Commons, a body of representatives and not of delegates,

continue to act as interpreter of the sense of the community as a whole; and the temper of the House will often exercise a subtle and indefinable influence upon Governments, not less real than that of the division lobbies.

Formally the support of the House of Commons remains necessary to the existence, to the executive energy, to the legislative activity of a Government, and it is not merely fanciful to associate this constant opportunity, still enjoyed, for questioning, surveying, and in a more limited degree discussing the action of a Government, with the duties connoted in the term ' the High Court of Parliament '.

APPENDIX I

THE NORTHERN IRELAND PARLIAMENT

THE Northern Ireland Parliament was established by the Government of Ireland Act, 1920 [1], and consists of the Crown, a Senate, and a House of Commons. It exercises jurisdiction over an area comprising the Parliamentary Counties of Antrim, Armagh, Down, Fermanagh, Londonderry, and Tyrone, and the Parliamentary Boroughs of Belfast and Londonderry [2].

§ 1. *Legislative Powers.*

The Northern Ireland Parliament does not possess the legislative omnipotence of the United Kingdom Parliament, even within its own area. Its powers are limited by the Act which created it, and these limitations fall into certain well-defined groups.

The Parliament may make laws for the peace, order, and good government of Northern Ireland, but only in respect of matters exclusively relating to Northern Ireland or any part thereof. On certain very important subjects, however, it has no power to legislate at all. Among these are: the Crown or the property of the Crown, or the Lord Lieutenant; the making of peace and war or matters arising from a state of war; the armed forces of the Crown or the defence of the realm; treaties or any relations with foreign states or with other parts of the Crown's dominions; dignities or titles of honour; treason; alienage, naturalization, aliens as such, or domicile; trade with any place outside Northern Ireland, quarantine; navigation (including merchant shipping); submarine cables; wireless telegraphy, aerial navigation, light-houses; buoys and beacons; coinage, legal tender and negotiable instruments; trademarks and designs, copyright or patent rights; services reserved by the Act, so long as they remain reserved. The postal service, post office savings bank, and trustee savings banks, designs for postal or revenue stamps, the registration of deeds in the Public Record Office, remain for the time being reserved matters, as do also matters relating to land purchase in Ireland.

[1] 10 & 11 Geo. 5, c. 67.

[2] See, however, Art. 12 of the Irish Agreement of December 6, 1921 (*post*, p. 420).

The Parliament has no power to repeal or alter any of the provisions of the Government of Ireland Act itself, or of any Act of the United Kingdom Parliament passed after the appointed day and extending to Northern Ireland, even though that Act deals with a matter with respect to which the Northern Ireland Parliament has power to make laws.

The Parliament has no power to make laws directly or indirectly establishing or endowing any religion, or interfering in any respect with religious equality.

It cannot make any law for the compulsory acquisition of any property without compensation.

Lastly, its powers with regard to taxation are limited. It can make no law imposing customs or excise duties, excess profits duty, corporation profits tax, or any other tax on profits, income tax or super tax, or any tax substantially the same as any of those duties or taxes, or any tax in the nature of a general tax on capital.

Any law made in contravention of any restrictions imposed by the Government of Ireland Act is, so far as it contravenes those restrictions, void. Special provision is made whereby on the representation of the Lord Lieutenant or a Secretary of State, questions as to the validity of any law or proposed law of the Northern Ireland Parliament may be determined by the Judicial Committee of the Privy Council; but ordinarily questions as to the validity of such laws will be decided in the Courts in the same way as other disputed questions of law.

The jurisdiction of the United Kingdom Parliament over Northern Ireland remains unaffected, though it may be assumed that the jurisdiction will not be exercised with respect to matters within the jurisdiction of the Northern Ireland Parliament save at the request or with the concurrence of the Government of Northern Ireland. S. 75 of the Act expressly declares that the supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters, and things in Northern Ireland and every part thereof.

§ 2. *Who may choose and who may be chosen.*

The Senate consists of twenty-six members, two of whom, the Lord Mayor of Belfast and the Mayor of Londonderry, hold office *ex officio*, while the remainder are elected by

members of the House of Commons for Northern Ireland on the principle of proportional representation.

The House of Commons consists of fifty-two members, including four University members. In the case of a contested election of the full number of members, the election is on the principle of proportional representation. The franchise is the same as in the case of electors for the United Kingdom Parliament, and all existing election laws in force in the United Kingdom apply; but the Northern Ireland Parliament may after three years from the day of its first meeting alter the existing law relating to the qualification and registration of electors, the constituencies and the distribution of members among the constituencies, though not the total number of members.

The laws of the United Kingdom relating to the qualifications and disqualifications of members of the House of Commons of the United Kingdom apply to the members both of the Senate and of the House of Commons of Northern Ireland; but a peerage does not disqualify for membership of either House. Power is given to the Crown to declare by Order in Council that the holders of the offices specified in the Order shall not be disqualified from sitting or voting in either House, and the acceptance of such an office shall not vacate the holder's seat in the House of Commons of Northern Ireland. An Order in Council has been made under this power which specifies among such offices any office, by whatever title designated, the holding whereof constitutes the holder a Minister of Northern Ireland, the office of Parliamentary Secretary or Assistant Parliamentary Secretary of any Department of the Government of Northern Ireland, and the office of Attorney-General for Northern Ireland.

Membership of one House is a disqualification for a seat in the other; but by a provision which is a novelty in the constitutional law of the United Kingdom a Minister who is a member of one House may sit and speak in the other, though he may not vote there.

A member of either House may resign his seat by giving notice of his resignation in such manner as the Standing Orders of the House may provide, or if no such provision is made, by giving notice to the Lord Lieutenant.

The term of office of a Senator is eight years, one half of the

Senators retiring every four years. The members who are to retire at the end of the first four years will be selected by lot. The term of office of a Senator is not affected by a dissolution.

§ 3. *Meeting of Parliament.*

The Northern Ireland Parliament is summoned, prorogued, and dissolved by the Lord Lieutenant in the King's name, and the Act requires that there shall be a session once at least in every year, with a period of not more than twelve months between the last sitting of Parliament in one session and its first sitting in the next session. The term of a Parliament is five years from the day on which the summons directs the House of Commons to meet, unless, of course, it is dissolved at an earlier date.

The Parliament met for the first time on June 7, 1921, and the proceedings followed very closely the ceremonial described earlier in this book in the case of the Parliament of the United Kingdom, as the following extracts from the official report will show.

'The Parliament begun and held at the City of Belfast, on Tuesday, the Seventh day of June, in the Twelfth Year of the Reign of Our Sovereign Lord George, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, and in the year of our Lord, 1921.

'On which day, at half an hour after Eleven of the Clock, being the first day of the meeting of this Parliament, pursuant to Proclamation, Arthur Irwin Dasent, Esq., Clerk of the House of Commons, attending in the House, according to his duty, the Clerk of the Crown and Hanaper (Mr. Gerald Horan, K.C.) delivered to the said Arthur Irwin Dasent, Esq., a book containing a list of the names of the Members returned to serve in this Parliament.

'Hon. Members having repaired to their seats, the Mace being then beneath the Table, Prayers were said by His Grace the Lord Primate of Ireland (Most Rev. Dr. D'Arcy). . . .

'His Excellency the Lord Lieutenant then entered the Chamber preceded by the two mace-bearers of the Belfast Corporation, and attended by his private Secretary (Mr. S. G. Tallents, C.B., C.B.E.); Ulster King-of-Arms (Major Sir Neville Rodwell Wilkinson, C.V.O.); Rt. Hon. Sir John Anderson, K.C.B. (Under Secretary for Ireland); and Sir Frederick Moneypenny, C.B.E., M.V.O. (City Chamberlain).

'The Clerk of the House (by direction of His Excellency the Lord Lieutenant) read His Majesty's Proclamation as follows:—

'"By His Excellency the Lord Lieutenant-General and General

Governor of Ireland. A Proclamation Declaring the Calling of a Parliament of Northern Ireland.

'"[1] Whereas His Majesty is desirous and resolved to meet His People of Northern Ireland and to have their advice in Parliament.

'"Now I, the Right Honourable Edmund Bernard Viscount Fitz-Alan of Derwent, Lieutenant-General and General Governor of Ireland, do hereby make known to all His Majesty's loving subjects His Royal Will and Pleasure to call a Parliament of Northern Ireland and do further declare that I have given order that the Chancellor of that part of the United Kingdom called Ireland do upon notice thereof forthwith issue writs in His Majesty's Name under the Great Seal of Ireland in due form and according to law for calling a Parliament of Northern Ireland to meet at the City of Belfast on Tuesday the 7th day of June next.

'"And I do hereby also by this proclamation require writs forthwith to be issued under the Great Seal of Ireland accordingly to the said Chancellor for causing the Senators and Commons who are to serve in the said Parliament to be duly returned to and give their attendance in His Majesty's said Parliament on Tuesday the 7th day of June next, which writs are to be returnable in due course of law.

'"Given at His Majesty's Castle of Dublin this 4th day of June, 1921."'

The Lord Lieutenant then said:

'"I have it in command from His Majesty to let you know that as soon as the election of the elected members of the Senate has been held and the Members of both Houses shall have been sworn, the cause of His Majesty calling this Parliament of Northern Ireland will be declared to you, and it being necessary that the Speaker of the House of Commons of Northern Ireland should be first chosen, it is His Majesty's pleasure that you, Members of the House of Commons, do proceed to the choice of Speaker, and that you present such person whom you shall so choose here for His Majesty's Royal approbation."

'The Lord Lieutenant then retired together with Senators present.'

The House of Commons then proceeded to the election of a Speaker, the formalities of election following those already described in the case of the election of a Speaker of the Parliament of the United Kingdom. A Speaker having been chosen—

'Mr. Speaker-Elect (standing before the Table and addressing His Excellency the Lord Lieutenant): My Lord Lieutenant, I have to inform your Excellency that His Majesty's faithful Commons of Northern Ireland in obedience to the Royal Command and in exercise of their undoubted rights and privileges, have proceeded to the election of a Speaker, and their choice has fallen on me. I therefore present

[1] Some formal recitals are omitted.

myself to Your Excellency, and submit myself for His Majesty's gracious approbation.

'His Excellency the Lord Lieutenant: Major O'Neill, being sensible of your zeal in the public service and of your ample sufficiency to discharge the right duties which his faithful Commons of Northern Ireland have elected you to execute, I do on His Majesty's behalf most fully approve and confirm you as their Speaker.'

The Speaker thereupon claimed for the Commons of Northern Ireland 'all the ancient and undoubted rights and privileges' assured to them by the Government of Ireland Act, 1920, that the most favourable construction might be placed on all their proceedings, and that if he himself should be led into any inadvertent error, the blame might be imputed to him alone and not to His Majesty's faithful Commons.

The Lord Lieutenant on behalf of His Majesty most readily confirmed the rights, privileges, and immunities which the Speaker had claimed, adding that with respect to the Speaker himself, although His Majesty was sensible that he stood in no need of such assurance, His Majesty would ever put the most favourable construction on his words and actions.

After reminding the members of both Houses that their next duty was to take the oath required by law, the Lord Lieutenant retired, followed by the Speaker and the Serjeant-at-Arms carrying the Mace.

Being robed, the Speaker returned, preceded by the Serjeant-at-Arms with the Mace, and, the Mace having been placed on the Table, the Speaker and the other members of the House of Commons took the oath.

On June 20 the Senate met for the first time.

'On which day at half an hour after Eleven of the Clock, the Lord Mayor of Belfast (Senator William Frederick Coates, D.L.), who was preceded by the Gentleman Usher of the Black Rod (Sir Frederick Moneypenny, M.V.O., C.B.E.) with the Mace, entered the Senate and sat as Speaker in pursuance of the Election of Senators (Northern Ireland) Order, 1921. Prayers were said by the Reverend Samuel Thompson, M.A.'

The Senators, after taking the oath, then proceeded to the election of a Speaker and adjourned until June 22.

On June 22, the Senate met at a quarter past twelve, and after prayers—

'The King being seated on the Throne, and the Commons being at the Bar with their Speaker, His Majesty was pleased to deliver

a most Gracious Message to both Houses of Parliament and then retired.'

On the following day the Senate met at a quarter past eleven.

'His Excellency the Lord Lieutenant-General and Governor-General of Ireland (Viscount FitzAlan of Derwent, K.P., G.C.V.O., D.S.O.) being seated on the Throne, commanded the Gentleman Usher of the Black Rod to let the Commons know "It is His Excellency's pleasure that they attend him immediately in this House".

'The Commons being at the Bar with their Speaker His Excellency read His Majesty's most Gracious Speech to both Houses of Parliament and then retired.'

The Senate then resolved to present two addresses to His Majesty, expressing their thanks for the Message and Speech.

On their return to their own Chamber the House of Commons, after transacting some formal business, read for the first time a Bill for the more effectually preventing clandestine outlawries [1]. The Speaker read to the House His Majesty's Message and his Majesty's Speech, and it was agreed to present two addresses to His Majesty expressing the thanks of the House of Commons for Message and Speech. The addresses both of the Senate and of the House of Commons were ordered to be presented to His Majesty by such members of the House as were of His Majesty's most honourable Privy Council.

§ 4. *Procedure of the two Houses.*

The powers, privileges, and immunities of the Senate and the House of Commons are such as may be defined by Act of the Northern Ireland Parliament and, until so defined, are to be those enjoyed by members of the House of Commons of the United Kingdom at the date of the Government of Ireland Act. The requirement as to the taking of the oath by members both of the Senate and of the House of Commons is the same as in the case of the House of Commons of the United Kingdom.

The proceedings of the Senate are regulated by Standing Orders which the House has adopted for the purpose. The House of Commons has adopted (with certain modifications) the Standing Orders of the House of Commons of the United

[1] See *ante*, pp. 67, 71, 79.

Kingdom, and has resolved that the law and practice of that House as stated in the twelfth edition of Sir Erskine May's book on Parliamentary Practice shall govern its proceedings.

The rule of the United Kingdom Parliament that no proposal for raising or spending public money shall be considered save on the recommendation of the Crown is made statutory in the case of the Northern Ireland Parliament by the Government of Ireland Act.

Bills imposing taxation or appropriating revenue must originate in the House of Commons and may not be amended by the Senate; nor may the Senate amend any bill so as to increase any proposed burdens or charges on the people. To prevent 'tacking' the Act provides that any bill which appropriates revenue or moneys shall deal only with that appropriation.

There are special provisions in the Act which deal with the case of a conflict between the two Houses. A bill which is sent up to the Senate from the House of Commons at least one month before the end of the session and which fails to pass the Senate either unamended or with amendments to which the House of Commons are willing to agree may be introduced again in the next session, and if it again fails to pass the Senate the Lord Lieutenant may during that session convene a joint session of the two Houses. In the case of a money bill rejected by the Senate the joint session may be convened in the same session of Parliament. At a joint session the two Houses deliberate and vote together, and if the bill is affirmed by a majority of the members present and voting it is deemed to have been duly passed by both Houses.

§ 5. *The Royal Assent.*

The Royal Assent is given or withheld by the Lord Lieutenant; but he must comply with any instructions given by the Crown in respect of any such bill, and he must, if so directed by the Crown, reserve any such bill for the signification of the Crown's pleasure. A bill so reserved will not have any force unless and until within one year from the date on which it was presented to the Lord Lieutenant for the royal assent, the Lord Lieutenant makes known that it has been assented to by the Crown.

The enacting words of an Act of the Northern Ireland Parliament are in the following form :

'Be it enacted by the King's Most Excellent Majesty, and the Senate and the House of Commons of Northern Ireland, in this present Parliament assembled, and by the authority of the same, as follows.'

The signification of the Royal Assent is endorsed upon a bill, without the formalities described in the case of the United Kingdom Parliament or the use of the words ' Le Roy le veult '.

APPENDIX II

THE IRISH AGREEMENT OF DECEMBER 6TH, 1921

1. IRELAND shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace order and good government of Ireland, and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State.

2. Subject to the provisions hereinafter set out the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State.

3. The representative of the Crown in Ireland shall be appointed in like manner as the Governor-General of Canada, and in accordance with the practice observed in the making of such appointments.

4. The oath to be taken by Members of the Parliament of the Irish Free State shall be in the following form :—

I ..... do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established and that I will be faithful to H.M. King George V, his heirs and successors by law, in virtue of the common

citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations.

5. The Irish Free State shall assume liability for the service of the Public Debt of the United Kingdom as existing at the date hereof and towards the payment of war pensions as existing at that date in such proportion as may be fair and equitable, having regard to any just claims on the part of Ireland by way of set off or counterclaim, the amount of such sums being determined in default of agreement by the arbitration of one or more independent persons being citizens of the British Empire.

6. Until an arrangement has been made between the British and Irish Governments whereby the Irish Free State undertakes her own coastal defence, the defence by sea of Great Britain and Ireland shall be undertaken by His Majesty's Imperial Forces, but this shall not prevent the construction or maintenance by the Government of the Irish Free State of such vessels as are necessary for the protection of the Revenue or the Fisheries.

The foregoing provisions of this article shall be reviewed at a conference of Representatives of the British and Irish Governments to be held at the expiration of five years from the date hereof with a view to the undertaking by Ireland of a share in her own coastal defence.

7. The Government of the Irish Free State shall afford to His Majesty's Imperial Forces :—

(*a*) In time of peace such harbour and other facilities as are indicated in the Annex hereto, or such other facilities as may from time to time be agreed between the British Government and the Government of the Irish Free State ; and

(*b*) In time of war or of strained relations with a Foreign Power such harbour and other facilities as the British Government may require for the purposes of such defence as aforesaid.

8. With a view to securing the observance of the principle of international limitation of armaments, if the Government of the Irish Free State establishes and maintains a military defence force, the establishments thereof shall not exceed in size such proportion of the military establishments maintained

in Great Britain as that which the population of Ireland bears to the population of Great Britain.

9. The ports of Great Britain and the Irish Free State shall be freely open to the ships of the other country on payment of the customary port and other dues.

10. The Government of the Irish Free State agrees to pay fair compensation on terms not less favourable than those accorded by the Act of 1920 to judges, officials, members of Police Forces, and other Public Servants, who are discharged by it or who retire in consequence of the change of government effected in pursuance hereof.

Provided that this agreement shall not apply to members of the Auxiliary Police Force or to persons recruited in Great Britain for the Royal Irish Constabulary during the two years next preceding the date hereof. The British Government will assume responsibility for such compensation or pensions as may be payable to any of these excepted persons.

11. Until the expiration of one month from the passing of the Act of Parliament for the ratification of this instrument, the powers of the Parliament and the Government of the Irish Free State shall not be exercisable as respects Northern Ireland, and the provisions of the Government of Ireland Act, 1920, shall, so far as they relate to Northern Ireland, remain of full force and effect, and no election shall be held for the return of members to serve in the Parliament of the Irish Free State for constituencies in Northern Ireland, unless a resolution is passed by both Houses of the Parliament of Northern Ireland in favour of the holding of such elections before the end of the said month.

12. If, before the expiration of the said month, an address is presented to His Majesty by both Houses of the Parliament of Northern Ireland to that effect, the powers of the Parliament and the Government of the Irish Free State shall no longer extend to Northern Ireland, and the provisions of the Government of Ireland Act, 1920 (including those relating to the Council of Ireland[1]) shall, so far as they relate to Northern

[1] The Council of Ireland under the Act of 1920 was to consist of a President nominated by the Lord-Lieutenant and forty members, seven elected by the Senates, and thirteen by the Houses of Commons of Southern and Northern Ireland respectively. Its functions were to be partly legislative and partly administrative, and its objects were stated in the Act to be (*inter alia*) 'the promotion of mutual intercourse and uniformity in relation to

Ireland, continue to be of full force and effect, and this instrument shall have effect subject to the necessary modifications.

Provided that if such an address is so presented a Commission consisting of three persons, one to be appointed by the Government of the Irish Free State, one to be appointed by the Government of Northern Ireland, and one who shall be Chairman, to be appointed by the British Government, shall determine, in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographic conditions, the boundaries between Northern Ireland and the rest of Ireland, and for the purposes of the Government of Ireland Act, 1920, and of this instrument, the boundary of Northern Ireland shall be such as may be determined by such Commission.

13. For the purpose of the last foregoing article, the powers of the Parliament of Southern Ireland under the Government of Ireland Act, 1920, to elect members of the Council of Ireland, shall, after the Parliament of the Irish Free State is constituted, be exercised by that Parliament.

14. After the expiration of the said month, if no such address as is mentioned in Article 12 hereof is presented, the Parliament and Government of Northern Ireland shall continue to exercise as respects Northern Ireland the powers conferred on them by the Government of Ireland Act, 1920, but the Parliament and Government of the Irish Free State shall in Northern Ireland have in relation to matters in respect of which the Parliament of Northern Ireland has not power to make laws under that Act (including matters which under the said Act are within the jurisdiction of the Council of Ireland) the same powers as in the rest of Ireland subject to such other provisions as may be agreed in manner hereinafter appearing.

15. At any time after the date hereof the Government of Northern Ireland and the provisional Government of Southern

matters affecting the whole of Ireland ' and ' the administration of services which the two Parliaments mutually agree should be administered uniformly throughout the whole of Ireland '. The Act itself also entrusted the administration of certain services to the Council. The Council has never met and its future functions remain obscure ; but an official announcement was made on January 21, 1922, that the Prime Minister of Northern Ireland and the Chairman of the Provisional Government in Southern Ireland had agreed to discuss means for devising ' a more suitable system than the Council of Ireland for dealing with problems affecting all Ireland '.

Ireland hereinafter constituted may meet for the purpose of discussing the provisions subject to which the last foregoing Article is to operate in the event of no such address as is therein mentioned being presented, and those provisions may include :—

(*a*) safeguards with regard to patronage in Northern Ireland,

(*b*) safeguards with regard to the collection of revenue in Northern Ireland,

(*c*) safeguards with regard to import and export duties affecting the trade or industry of Northern Ireland,

(*d*) safeguards for minorities in Northern Ireland,

(*e*) the settlement of the financial relations between Northern Ireland and the Irish Free State,

(*f*) the establishment and powers of a local militia in Northern Ireland and the relation of the Defence Forces of the Irish Free State and of Northern Ireland respectively ;

and if at any such meeting provisions are agreed to, the same shall have effect as if they were included amongst the provisions subject to which the powers of the Parliament and Government of the Irish Free State are to be exercisable in Northern Ireland under Article 14 hereof.

16. Neither the Parliament of the Irish Free State nor the Parliament of Northern Ireland shall make any law so as either directly or indirectly to endow any religion or prohibit or restrict the free exercise thereof or give any preference or impose any disability on account of religious belief or religious status or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school or make any discrimination as respects State aid between schools under the management of different religious denominations or divert from any religious denomination or any educational institution any of its property except for public utility purposes and on payment of compensation.

17. By way of provisional arrangement for the administration of Southern Ireland during the interval which must elapse between the date hereof and the constitution of a Parliament and Government of the Irish Free State in accordance therewith, steps shall be taken forthwith for summoning a meeting of members of Parliament elected for constituencies in Southern

Ireland since the passing of the Government of Ireland Act, 1920, and for constituting a provisional Government, and the British Government shall take the steps necessary to transfer to such provisional Government the powers and machinery requisite for the discharge of its duties, provided that every member of such provisional Government shall have signified in writing his or her acceptance of this instrument. But this arrangement shall not continue in force beyond the expiration of twelve months from the date hereof.

18. This instrument shall be submitted forthwith by His Majesty's Government for the approval of Parliament and by the Irish signatories to a meeting summoned for the purpose of the members elected to sit in the House of Commons of Southern Ireland, and, if approved, shall be ratified by the necessary legislation.

[An Annex specifies the facilities referred to in Article 7 of the Agreement.]

NOTE

THE above Agreement was approved by both Houses of Parliament on 16 December, 1921, and by the Southern Ireland members on 16 January, 1922. Statutory effect has now been given to it by the Irish Free State (Agreement) Act, 1922. This Act sets out the Agreement in a Schedule and provides that it shall have the force of law as from the date of the passing of the Act. The Act further provides for the transfer of the necessary powers to the Provisional Government by means of Orders in Council and for a general election of members of the Parliament to which the Provisional Government shall be responsible. By Section 1 (3), ' No writ shall be issued after the passing of this Act for the election of a member to serve in the Commons House of Parliament for a constituency in Ireland other than a constituency in Northern Ireland '. The severance of the Irish Free State from the parliamentary system created by the Act of Union in 1800 is thus complete.

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